88-1449

No.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DISTRICT 1199C, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, DIVISION OF RWDSU, AFL-CIO,
Petitioner

v.

SAUNDERS HOUSE, a/k/a THE OLD MAN'S HOME OF PHILADELPHIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where a finding by the National Labor Relations Board that impasse has not been reached in the negotiation of an initial collective bargaining agreement is supported by substantial evidence on the record when considered as a whole and such finding is entitled to special deference because of the expertise of the National Labor Relations Board may a court overturn said finding merely because it interprets the facts differently.

2. Whether impasse in the negotiation of an initial collective bargaining agreement must be found where the Union in an "off-the-record" meeting with the Employer discloses terms that might be acceptable, so that when the Union formally proposes some of those terms in later negotiation sessions, the concessions

by the Union are dismissed as already disclosed.

PARTIES BELOW

The only other party not listed in the caption is the National Labor Relations Board, which cross-appealed for enforcement of the Order of the National Labor Relations Board at Case No. 4-CA-12047 before the United States Court of Appeals for the Third Circuit. The National Labor Relations Board to the best of Petitioner's knowledge will not file a separate Petition.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

Petitioner, District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO

(District 1199C), respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (108A-119A), is reported at 719 F.2d 683. The Decision of the National Labor Relations Board (1A-21A; 22A-104A) is reported at 265 NLRB No. 207.

JURISDICTION

The Judgment of the Court of Appeals (105A) was entered on December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, Title 29, United States Code.

§158 Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in §157 of this Title;

...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §159(a) of this Title.

(d) For the purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: ...

STATEMENT OF THE CASE

1. Petitioner, District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO ("District 1199C" or "the Union"), was certified on August 29, 1980, as the exclusive collective bargaining representative of all regular part-time and full-time service and maintenance employees employed at respondent, Saunders House a/k/a The Old Man's Home of Philadelphia ("Saunders House" or "the Employer") (27A). Saunders House, a non-profit Pennsylvania corporation engaged in the business of providing long-term health services at its Philadelphia, Pennsylvania facility (26A), is an employer engaged in commerce within the meaning of §2(6) and (7) of the National Labor Relations Act, 29 U.S.C. §151 (26A).

2. District 1199C commenced negotiations with Saunders House for an initial contract on September 9, 1980, when Henry Nicholas, the Union's President, submitted the Union's initial proposal for an agreement to Saunders House (32A). This initial proposal contained, inter alia, proposals for wages, full union security and checkoff of union dues (33A). The parties first met to negotiate on September 16, 1980, (33A) and again on September 24, 1980, (36A) at which time the Employer had not yet made any economic proposals.[1] On September 26, 1980, the Employer wrote to the employees and unilaterally implemented an 8% wage increase over the Union's objection. No negotia-

[1]On September 19, 1980, the Employer did submit to the Union a proposed contract. However, this proposal did not contain any wage proposals (37A).

tions on wages had taken place prior to the implementation of this retroactive 8% increase by the Employer (38A).

Thereafter, the Union filed an unfair labor practice charge against the Employer concerning the unilateral granting of the 8% wage increase without prior negotiations, which charge was ultimately settled by a non-Board settlement over the objection of the Union (38A-39A).

Although the parties met in negotiations on October 8, October 29, November 5, and November 12, 1980, wages were not discussed because the Employer requested that the subject be deferred (38A; 46A-47A). The Federal Mediation and Conciliation Service (FMC) appointed a mediator to aid in the negotiations (39A). On November 24, 1980, the mediator spoke privately to negotiators for the Employer

and Union in an attempt to speed up the negotiations (40A). At that time, the Employer promised to deliver a wage proposal at the next negotiation session (40A-41A).

3. On December 2, 1980, the Union modified its wage proposal and in response the Employer made a partial proposal (44A-45A). The Union proposed across-the-board wage increases of $20.00 per week, effective September, 1980, $18.00 per week effective September 1, 1981, and $18.00 per week effective September 1, 1982, plus a cost of living adjustment in the second year of the contract[2] (44A).

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[2]The Union's wage proposal on December 2, 1980, was a modification of its initial September 9, 1980 written proposal. On September 9, 1980, the Union had proposed a $40.00 per week across-the-board wage increase for all bargaining employees and a cost of living adjustment ranging up to a maximum of $5.00 per week (33A).

The Employer proposed a one-year contract, effective as of the date of ratification, with a cost of living adjustment, effective July 1, 1981, in accordance with the formula set forth in the Union's proposed contract (44A).

The parties met again in negotiations on December 8, December 22, 1980, and January 26, 1981. At these meetings, the subject of wages was not discussed (47A). On February 6, 1981, the chief negotiators for both sides agreed to meet privately (47A).

4. The private "off-the-record" meeting took place on February 20, 1981 (48A). At that meeting, the Union's negotiator candidly suggested that she would recommend an agreement that contained a dues checkoff, a modified union security clause, and wage increases of 8% in each year of a three-year contract

(49A). Although the Employer's negotiator said he would get back to her, he neither acknowledged or responded to her discussions as a proposal (68A-69A).

On March 2, 1981, the Employer presented its first and final complete wage proposal with contract expiration date of September 30, 1981 (53A; 56A). The Employer's wage proposal was set forth in terms of various rates of pay by job classification for each individually named employee in the unit, with some employees receiving nothing or $.10 per hour and others up to 14 per cent increases (54A-55A).[3]

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[3]On March 3, 1981, the Employer wrote directly to the employees advising them of the proposal and the fact that it was its final offer (56A). This tactic was identical to that followed by the Employer when it unilaterally granted the employees an 8% increase after the Union certification but prior to negotiations in 1980 (31A-32A).

On March 5, 1981, the Union presented its "final" wage proposal calling for an 8% wage increase effective 9/16/80, 10% effective 7/1/81, and 10% effective 7/1/82, with no demand for a cost of living adjustment (COLA) (57A).

On March 16, the FMC appointed a Board of Inquiry (58A). At the Board, the Union presented its wage position of March 5 but added the demand for COLA (59A). The Union continued to seek full union security, dues checkoff and several other key issues (59A). The Employer sought only its proposal of March 2 (60A). The nonbinding recommendations of the Board were unacceptable to either party (61A-62A). However, the Union subsequently adopted the Board recommendation on modified union security (62A), and proposed it at the March 30 bargaining session (62A).

5. On April 15, the Union President as chief negotiator presented a series of proposals designed to reach agreement (63A). They included a general 8% wage increase during each of the three years of the contract with no COLA, modified union security, sick leave and grievance hearing demands, union activity and dues checkoff (63A-64A). All other Union demands were dropped (64A). The Employer's negotiator asked for clarification only on sick leave and grievance and stated he would discuss the proposal with his client (64A-65A).

The next day, April 16, the Employer wrote the Union stating that the Union's proposal presented no changes in its position (69A). He also informed the Union that unless it accepted the Employer's proposal by April 22, the Employer would implement its proposed

wage increase previously presented at the March 2 bargaining session (69A). The Employer received a letter from the Union President dated April 20, denying that they were at impasse, insisting that the Union's April 15 proposals were concessions and objecting to any unilateral wage increase (70A). Nicholas reiterated his no impasse position on April 22 by hand delivered letter (70A). After unsuccessful attempts to contact the Union President, the Employer, on April 22, granted wage increases averaging approximately 6½ per cent to its employees (70A-71A).

6. That same day, the Union filed a charge of unfair practice, alleging, inter alia, violations of §8(a)(1) and §8(a)(5) by engaging in surface bargaining and by unilateral implementation of the

wage rate prior to impasse (22A-23A)[4].

On October 27, 1981, a complaint issued alleging violations of §§8(a) (1) and (5) in the granting of a wage increase to the employees of Saunders House without bargaining to impasse with the Union (23A). The Employer answered the Complaint denying the charges (23A). A hearing was held before Administrative Law Judge Marvin Roth on March 10, 1982, in Philadelphia, Pennsylvania (22A).

7. On July 30, 1982, after an evidentiary hearing, the Administrative Law Judge found that the Employer had violated §§8(a)(1) and (5) of the Act, by failing to bargain in good faith and

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[4]On July 1, 1981, the Employer notified the Union that it wished to grant 8% across-the-board increases to employees on that date, not the 6% it had proposed on March 2 (71A). The Union demanded negotiations and the parties met again on July 29, and August 25, 1981 (71-72A; 33A).

that no impasse had been reached prior to the unilateral increase of April 22 (87A). The Employer filed exceptions to the National Labor Relations Board (NLRB) challenging credibility findings and the finding of bad faith bargaining (2A; 3A).

On December 16, 1982, the NLRB affirmed the Administrative Law Judge's conclusion that the Employer's unilateral implementation of its first and last wage offer on April 22 violated §§8(a)(1) and (5) of the Act because the parties had not bargained to impasse when the Employer implemented the increase (12A).[5] The NLRB agreed with the Employer's exception to the finding that it had not acted in "good faith," because the General Counsel had not charged bad faith and had conceded

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[5]The NLRB denied all exceptions by the Employer to the credibility determination of the Administrative Law Judge (2A).

that bad faith was not in issue when the hearing began (3A).

Subsequently, the Employer petitioned the Third Circuit Court of Appeals for review of the NLRB's Order holding that it had violated §§8(a)(1) and (5) of the Act by its conduct and the NLRB cross-applied for enforcement of its Order (109A).

8. In an Opinion filed October 26, 1983, the court denied enforcement of the NLRB's Order on the grounds that an impasse did exist when the wages were paid (119A). The court concluded that a shift from a position communicated "off-the-record" to one formally proposed on-the-record was not a concession sufficient to preclude a finding of impasse (119A). According to the court, the Union did not propose anything on April 15 that it had not already

presented to the Employer at an earlier date in the "off-the-record" meeting (119A). Since the Union's wage proposal was identical to that stated in an off-the-record session on February 20, the court viewed this as no real movement in the Union's position (119A). Accordingly, the court found that there was not substantial evidence on the record to support the NLRB's conclusion that the parties were not at impasse and that the Employer's unilateral wage increase constituted an unfair labor practice.

Therefore, on December 2, 1983, the court entered an Order denying the NLRB's Cross-Petition for enforcement and granting the Employer's Petition for Review (102A).

REASONS FOR GRANTING THE PETITION

1. The decision below is in direct contravention of the public policy enunciated by other Circuits and this Court in Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404 (1982), and presents an important question of federal labor law which has not been, but should be, settled by this Court -- namely, the extent to which off-the-record conversations made by negotiators may be considered as formal contract proposals in negotiations between a union and an employer.

The court recognized that a finding of impasse in contract negotiations is a genuine question of fact and, thus, "'particularly amenable to the expertise of the NLRB as factfinder'" (117A) citing Huck Manufacturing Co., 693 F.2d at 1186. In addition, the court acknowledged the

narrow standard of review applicable in this case, i.e., that if the NLRB's conclusions of no impasse and the commission of an unfair labor practice are supported by substantial evidence on the record as a whole, the relief sought by the NLRB must be granted. Universal Camera Co. v. NLRB, 340 U.S. 474, 488 (1951) (117A).

Having correctly stated the standard of review, the court proceeded to ignore it and substitute its factual determinations for those of the NLRB to hold that impasse had occurred. This conflicts directly with the established policy enunciated by numerous Courts of Appeal and this Court on the question of determining impasse in contract negotiations.

In order fully to understand the ramifications of the court's decision, it is necessary to review the NLRB's treatment of impasse and the great

deference accorded its analyses by the courts. Although the National Labor Relations Act (NLRA) does not mention impasse, the language of the statute provides a basis for the impasse concept. Section 8(d) which defines the duty to bargain in good faith specifically provides that neither party is obligated to agree to a proposal or to make concessions. This situation means that of necessity stalemates in negotiations do occur. Since impasse is the prime justification for the unilateral acts of an employer, the determination of the precise point at which impasse occurs is critical, e.g., Alsey Refractories Co., 215 NLRB 785 (1974).

Since the finding of an impasse is a purely factual determination, the NLRB has never developed a precise definition

of a genuine impasse. The following issues have been required to be considered in determining impasse vel non:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, all are relevant factors to be considered in deciding whether an impasse in bargaining existed. Taft Broadcasting Co., WDAF-AM-FM TV, 163 NLRB No. 55, 64 LRRM 1386, 1333, enf'd. sub nom. American Federation of Television & Radio Artists, AFL-CIO, Kansas Local v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

Since a finding of impasse is a matter of judgment, the NLRB decision is a subjective factual determination, into which a myriad of factors enter.

The courts which have dealt with impasse questions have consistently agreed that there can be no formulaic approach

to determining when a genuine impasse has occurred. NLRB v. Charles D. Bonanno Linen Service, Inc., 630 F.2d 25, 34 (1st Cir. 1980), aff'd, 454 U.S. 404 (1982). As the court stated in Dallas General Drivers, Local 745, Teamsters v. NLRB, 355 F.2d 842, 845 (D.C. Cir. 1966):

> There is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations which arise in the field of industrial bargaining. Nor is there a rigid formula for assessing so subtle an issue as the precise time when an impasse occurs; ...

Whether bargaining has reached a genuine impasse is a "question of fact to which no mechanical definition can be applied." Fairmount Foods Co. v. NLRB, 471 F.2d 1170, 1173 (8th Cir. 1972). Rather, because the determination of impasse "depends on the mental state of the parties, [it] is a highly subjective inquiry." (Huck Mfg. Co. v. NLRB, 693 F.2d

1176, 1186 (5th Cir. 1982), which "remains at best an exercise of 'judgment' ... and at worst 'a visceral reaction of the trial examiner and the Board to the record' [citation omitted]." NLRB v. Charles D. Bonanno Linen Service, Inc., supra, 630 F.2d at 34.

From the foregoing discussion, it is apparent that the determination of whether the parties to negotiation have reached an impasse is a question of fact. The Courts of Appeals recognize this and overwhelmingly hold that the issue of the existence of an impasse is "particularly amenable to the expertise of the Board as factfinder." NLRB v. J.H. Bonck Co., 424 F.2d 634, 638 (5th Cir. 1970); Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60, 65 (2d Cir. 1979); Dallas General Drivers, Warehouseman and Helpers, Local No. 745 v. NLRB, 355 F.2d 842, 844-845 (D.C. Cir. 1966); Huck Mfg.

Co. v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982); American Fed. of Television & Radio Artists v. NLRB, 395 F.2d 622, 627 (D.C. Cir. 1968); NLRB v. King Radio Corp., 510 F.2d 1154, 1157 (10th Cir. 1975); NLRB v. Sheet Metal Workers, Inter. Assoc., Local Union No. 38, 575 F.2d 394, 398 (2d Cir. 1978); Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615, 621 (3d Cir. 1963).

The deference owed to an NLRB finding of impasse is illustrated by Dallas General Drivers v. NLRB, supra, 355 F.2d at 844-845:

> Our scope of review confines us to determining whether there is an absence of substantial evidence to support the Board's finding; impasse is a question of fact involving the Board's presumed expert experience and knowledge of bargaining problems. The problem of deciding when further bargaining on an issue is futile is often difficult for the bargainers and is necessarily so for the Board. But in the

> whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a Board which deals constantly with such problems.

The Ninth Circuit has interpreted the Fifth Circuit decision in NLRB v. J.H. Bonck Co., 424 F.2d 634 (5th Cir.) to mean that the NLRB's factual determination of impasse is entitled to "exceptional deference". California Trucking Ass'n v. Brotherhood of Teamsters, 679 F.2d 1275, 1286, n.12 (9th Cir. 1981).

This Court, in Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404, 418 (1982), recently reiterated that appellate courts were not to "substitute [their own] judgment for those of the Board with respect to the issues that Congress intended the Board should resolve." In upholding the NLRB's decision to refuse

to accept impasse as an unusual circumstance justifying an employer's withdrawal from a multi-employer bargaining unit, this Court refused to substitute its judgment for that of the NLRB.

> The Board might have struck a different balance from the one it has, and it may be that some or all of us would prefer that it had done so. But assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that Buffalo Linen ruled should be left to the Board. We cannot say that the Board's current resolution of the issue is arbitrary or contrary to law. 454 U.S. at 413
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> * * *
>
> But the dissenting justices would have us substitute our judgment for those of the Board with respect to the issues that Congress intended the Board should resolve. This we are unwilling to do. If the courts are to monitor so closely the agency's assessment of the kind of factors involved in this case, the role of the judiciary in administering regulatory statutes will be enormously expanded in

> its work load, become more complex and time-consuming. We doubt this is what Congress intended in subjecting the Board to judicial review. Indeed, we so held in Buffalo Linen. 454 U.S. at 418.

It is respectfully submitted that the Court below completely disregarded this policy and substituted its own factual determination for that of the National Labor Relations Board in direct contravention of this Court's decision in Charles D. Bonanno, supra.

As stated earlier, the Court below held that a mere shift from a position "off-the-record" to one on the record is not a concession sufficient to preclude a finding of impasse. According to the Court, since the Union's wage proposal of April 15 was no different than what the Union's negotiator had suggested she would recommend at an "off-the-record"

meeting on February 20, there was in fact no real movement in the Union's position (118A-119A). The court did concede that the Union's wage proposal on April 15 constituted significant movement from its prior on-the-record position (118A). By its holding, the court converted an "off-the-record" discussion between the party negotiators into a formal wage proposal made on the record by the Union. It is respectfully submitted by Petitioner that there is a complete absence of any authority for this position. In fact, the court points to none in support of its analysis and conclusions. By so holding, the Court below has clearly made a factual determination as to the significance of an informal "off-the-record" discussion between party negotiators. Such factual determinations are peculiarly within the expertise of the NLRB.

The ALJ specifically found, from the testimony of the Employer's chief negotiator, that he viewed the February 20 discussion as completely "off-the-record".

> It is undisputed that Abbott never mentioned the February 20 meeting in subsequent negotiations, or in the Board of Inquiry proceeding, or in the letters which he sent to the Regional Office in connection with the investigation of this case. Abbott explained that he regarded the meeting as "off the record," i.e., "in confidence" and that he would not even have mentioned the meeting in this proceeding if Ford had not testified concerning the meeting.[6] (49A-50A)

Under these facts, it is apparent that the Employer never considered the February 20 discussion to constitute a formal wage proposal by the Union.[7]

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[6] Credibility exceptions filed by Respondent to the NLRB were all rejected. (2A).

[7] Indeed, the ALJ and the NLRB both found that the Employer made no response to it and never acknowledged it as a proposal (9A; 16A; 68A-69A; 82A).

Further, the employer never responded to the Union negotiator's statements at this meeting (80A). It was not until March 2 that the Employer finally presented its first and last comprehensive wage proposal (53A; 56A).

The NLRB affirmed the ALJ's conclusion that the Union wage proposal on April 15 was a significant concession by it. In rejecting the Employer's contention that the April 15 wage proposal was not a new offer, the NLRB stated:

> The respondent contends that this is not a concession on the Union's part because it had been aware that such a proposal was acceptable after the February 20 meeting. We disagree. The Union's wage offer of April 15 offered now "on the record" and in conjunction with other proposals was a new offer on the Union's part and one showing a significant concession (18A).

Thus, it was both the ALJ and NLRB's factual determination that the

February 20 meeting between the chief negotiators did not produce a wage proposal by the Union. With this factual record before it, the court insisted that the Union wage proposal on April 15 was not a new offer or a concession of significance by the Union, contrary to the specific findings of the ALJ and the NLRB (18A; 81A; 87A).

It is respectfully submitted that the court below did not apply the appropriate standard of review of the NLRB and ALJ findings. Instead of limiting itself to considering whether there was substantial evidence on the record as a whole to support the findings, the court made its own factual findings as to the significance of the February 20 meeting, ignoring the other factors which the NLRB had found compelling.

The NLRB considered five[8] factors to determine no impasse existed (15A); the court considered only one. When an initial agreement is at stake, the NLRB's policy is to encourage "the fullest opportunity" for parties to effect agreement in initial contract negotiations. Alsey Refractories Co., 215 NLRB 785, 786 (1974) (15A-16A). In addition, although the negotiations spanned over six months, the discussions on the key issue were limited to three times at the request of the Employer (16A; 7A; 8A; 9A). The Union submitted its initial wage proposal prior to the first bargaining session on September 16, 1980. Not only did the

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[8]Good faith was found by the NLRB not to be in issue. The NLRB and the court disagreed about the February 20 meeting. The court did not look at the totality of negotiations but only at the wage proposal.

employer not discuss the Union's wage proposal, but it failed to put forth one of its own, and at the following session, asked that discussion of economic proposals be put off altogether. Thus, there was no discussion of wages for nearly three months, until December 2, 1980, when the Union modified its proposal and the Employer made a partial wage offer and said it was not prepared to discuss wages (7A). Subsequently, the Employer made its first and last presentation of a comprehensive wage proposal on March 2, 1981. The Union modified its proposal twice more, on March 5, 1981, and April 15, 1981. Thus, out of 17 negotiating sessions, wages were discussed only at 4 and then only on a limited basis.

The relatively brief length of negotiations on the wage issue does not support a finding of impasse. See,

Huck Mfg. Co. v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982); Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60, 65 (2nd Cir. 1979). The contemporaneous understanding of the parties is also crucial in determining impasse (16A). For an impasse to occur, neither party must be willing to compromise. Huck Mfg. Co. v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982). As the NLRB stated:

> Clearly, the Union did not believe the negotiations were at an impasse. Further, there is sufficient objective evidence to justify its belief. On April 15, the Union offered a proposal which showed movement on its part in important areas of dispute. The wage offer it made was the first "on the record" proposal of what the Union had intimated would be acceptable to it at the February 20 meeting between the parties' chief negotiators (17A-18A).

The Union's proposal of April 15 included modified offers on union security, wages and dropped other key demands.

These were important concessions on the part of the Union (18A). The willingness of the Union to make concessions in these areas is further support for the Union's contention that negotiations were not at impasse. Yama Woodcraft, Inc. d/b/a Cow-Pacific Furniture Mfg. Co., 228 NLRB 1337 (1977). (18A-19A).

The parties' conduct following the Employer's unilateral implementation on April 22 of its last wage offer further indicates that no impasse existed. The Employer on July 1, 1981, notified the Union of its intention to grant an 8% across-the-board increase to the employees instead of the 6% raise proposed in its "final" offer of March 2 (71A). The Union protested, demanded negotiations and the parties met two more times, July 29, 1981 and August 25, 1981 (33A; 71A-72A),

despite the "impasse." Thus there was substantial evidence on the record as a whole to support the NLRB's conclusion that no impasse had occurred and that the unilateral wage increase was an Employer unfair labor practice.

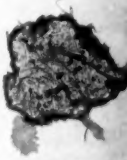
2. Unless this Court reviews and reverses the decision of the Court of Appeals, the very burden on the courts which was foretold in Charles D. Bonanno, supra, will engulf the judicial system. Every time an off-the-record conversation between negotiators is converted by one party to a formal offer presaging a stance of impasse once the offer is finally placed "on-the-record" to justify unilateral implementation of the last offer, the ensuing unfair practice charges found meritorious by the NLRB will clog the courts with petitions for review in

hopes of a more favorable, albeit less expert analysis of the bargaining dynamics. That was the purpose for which Congress established the NLRB and granted limited judicial review. But the courts are now prepared to second-guess the NLRB and thus issue an open invitation to substitute judicial factfinding for NLRB expertise.

Unless this decision is reversed, no meaningful off-the-record conversations between unions and employers will take place either to speed up negotiations or to clarify positions. Any union entering into such candid off-the-record discussion now does so at the peril of having its candor used against it to justify unilateral implementation of a wage offer on the grounds of "impasse" because the employer knew the union might accept less. Off-the-record discussions as a means of

clearing the air and narrowing the issues without waiving either side's positions will disappear as a means of assisting collective bargaining if this decision is permitted to stand.

The meaning of an "off-the-record" conversation as part of the dynamics of collective bargaining is a matter for the special expertise of the NLRB, not appellate courts.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 29, 1984

FJZ

265 NLRB No. 207

D--9481
Philadelphia,
Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAUNDERS HOUSE a/k/a THE OLD MAN'S HOME OF PHILADELPHIA

and

Case 4-CA-12047

DISTRICT 1199C, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYERS, DIVISION OF RWDSU, AFL-CIO

DECISION AND ORDER

On July 30, 1982, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in opposition to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its

authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] conclusions of the Administrative Law Judge as modified herein and to adopt his recommended Order.

The Administrative Law Judge found that the Repondent violated Section 8(a)(5) and (1) of the Act when it granted wage increases to employees without

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1. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administartive law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

affording the Union an opportunity to negotiate and bargain as the exclusive representative of the employees in such matters. The Administrative Law Judge rejected the Respondent's argument that the ongoing negotiations were at impasse making the wage increase permissible. He found rather that the Respondent had negotiated in bad faith and, thus, no impasse could be found.

The Respondent excepts to this finding, arguing that good faith at the bargaining table was not at issue in the case as it had been neither alleged in the complaint nor litigated at the hearing. We agree with the Respondent that its good faith was not in issue. Yet despite the merit in the Respondent's exceptions, we find that the Administrative Law Judge's ultimate conclusion is correct with regard to the Respondent's

institution of the wage increase. Our disagreement with the Administrative Law Judge is with his analysis of the issues before him, not his conclusion.

The Respondent and the Union were engaged in negotiations for an initial contract following the August 28, 1980, certification of the Union as the exclusive bargaining representative for the following unit of employees:

> All full and regular part time service, maintenance and technical employees including dietary, housekeeping, maintenance and nursing including nursing aides, licensed practical nurses and licensed graduate practical nurses employed by the Company at its Lancaster Avenue and City Line Avenue, Philadelphia, Pa., facility; excluding all other employees including professionals, managers, chefs, registered nurses, office clerical, guards and supervisors as defined in the Act.

As fully set forth in the Administrative Law Judge's Decision, the parties

met a total of 17 times over a 7-month period beginning September 16, 1980. Prior to the initial bargaining session, the Union submitted its contract proposal which included both a $40-a-week across-the-board wage increase and a cost-of-living increase. It also specified full union security and dues checkoff. At the September 16 meeting, the union wage proposal was not discussed. The Union expressed disapproval of the implementation of an 8-percent wage increase which the Employer had much earlier announced in a series of letters to the Union's attorney. At this early stage, the Respondent declared the discussion of wages to be at impasse and subsequently the Respondent implemented the 8-percent

increase.[2] The Respondent stated that The Respondent stated that it would present its own proposal to the Union shortly, which it did on September 19.

The Respondent's proposed contract did not include a wage proposal, but it indicated that the wage proposal was to follow. Throughout the next five sessions, the proposal was not presented and wages were not discussed. Some language concessions occurred during this period. On November 24, 1980, the Union asked for the Respondent's position on wages, union security, and dues checkoff. The Respondent's spokesman said the

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2 The Union filed unfair labor practice charges with regard to the 8-percent increase; the matter was ultimately resolved through an informal settlement agreement.

Company's answer on checkoff and union security was "no" but that a wage proposal would be presented at the next session.

On December 2, 1980, the Union made a new wage proposal which included an annual across-the-board increase for 3 years and a cost-of-living increase in the second year. The Respondent countered with an offer of a 1-year contract with a cost-of-living increase but refused to discuss wages any further; nor did discussion of wages take place at the next three sessions.

On February 6, 1981, the parties discussed their current position. Each side agreed to review its position and an "off the record" meeting was set. On February 20, the chief negotiator for each side met to candidly discuss their

positions. The union representative described as ultimately acceptable to the Union three successive annual increases of 8 percent, modified union security, and dues checkoff. The Respondent's negotiator agreed to discuss the union position with the Company and to present a wage proposal at the next session, which it did. On March 2, 1981, the Respondent proposed a complete revision of wages in all job classifications, resulting in increases from 0 to 55 cents. The average salary increase was 6-1/2 percent; in addition, a 6-percent general increase was to be given in lieu of the Respondent's December 2 offer of a cost-of-living increase. This offer was regarded by the Respondent as its final offer. Throughout the remaining sessions the Respondent returned to this offer as the only proposal it would consider.

On March 10, the Union proposed a sequence of annual raises of 8 percent, 10 percent, and 10 percent with no cost-of-living increase mentioned. There was no response from the Respondent to this proposal. At the hearing, Respondent's chief negotiator said he did not respond because he knew following the February 20 meeting that this was not the Union's final offer; however, there had been no response to the February 20 union statement either.

On March 16, the Federal Mediation and Conciliation Service appointed a board of inquiry. The Union presented its wage position to the board as being the sequence of increases included in the March 5 offer but now with a cost-of-living increase. The Union continued to seek full union security and dues checkoff among several other key issues.

Respondent sought only its proposal of March 2, maintaining its unwillingness to accept anything else. The nonbinding recommendations of the board were unacceptable to either party; however, the Union subsequently adopted the recommendation of a modified union shop which had been included in the board of inquiry's report. That modification was presented by the Union at the March 30 bargaining session.

On April 15, the union negotiator presented a series of union proposals intending to end what he described as an "impasse."[3] The proposals included a general 8-percent wage increase during each of the 3 years of the contract with

3 The Respondent would treat this characterization as evidence that negotiations had reached impasse. We are unconvinced given the bargaining posture of the Union that the terms was used with legal precision.

no cost-of-living increase, certain grievance procedures, modified union security, and checkoff, as proposed before. In addition, the Union added its proposal for sick leave, which had not been stressed before the board of inquiry, but dropped a request for the reinstatement of two workers. Little substantive discussion took place on these issues. The Respondent's negotiator agreed to discuss the matter with the Respondent; however, in his testimony he acknowledged that the proposals would be unacceptable as they had all been presented and rejected before. In fact, the next day, a letter was hand delivered to the Union indicating that the Respondent saw no change in the Union's proposal and that the parties were at impasse. The Respondent also said that it would implement the wage increases

in its March 2 offer if that same offer was not accepted by the Union prior to April 22. As stated earlier, the Respondent implemented the proposed wage increase on April 22 despite the Union's protestations that the parties were not at impasse.

Based on the above, we find no impasse existed at the time the Respondent instituted the unilateral change in wages. Accordingly, its action violates Section 8(a)(5) and (1) of the Act. It is well settled that an employer violates Section 8(a)(5) by refusing to negotiate over a mandatory subject of bargaining or by unilaterally changing a condition of employment which is under negotiation irrespective of whether the action is

taken in good faith.[4] In N.L.R.B. v. Benne Katz, d/b/a Williamsburg Steel Products Company, 369 U.S. 736, 743 (1962), the Supreme Court held:

> A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5),

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4 As noted earlier, the Administrative Law Judge found good faith to be in issue, contending that the determination of impasse encompasses consideration of good faith. While that is true, the complaint and the parties in their opening comments ended any speculation as to the absence of good faith on the Respondent's part. It would impugn the fairness of the hearing to conclude that a matter specifically not litigated was at the heart of the Respondent's violation. There is then no question that the Respondent bargained in good faith.

for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.

A unilateral change is unlawful under this rationale if the subject matter of the change is "under negotiation"; i.e., if the parties have not reached impasse. Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse

in bargaining existed.[5] These five factors when applied to this case will not support a finding of impasse. Although we have found Respondent's good faith is undisputed and this factor, therefore, standing alone, lends support to a finding that the parties reached impasse, the remaining factors (discussed seriatim) clearly establish that impasse was not reached. The parties were negotiating an initial agreement. Thus, the bargaining history does not favor a finding of impasse. To the contrary, it is the Board's policy to encourage "the fullest opportunity" for

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5 Taft Broadcasting Co., WDAF AM-FM TV, 163 NLRB 475, 478 (1967), enfd. sub nom. American Federation of Television and Radio Artists, AFL-CIO, Kansas Local v. N.L.R.B., 395 F.2d 622 (D.C. Cir. 1968).

parties to effect agreement in initial contract negotiations. Alsey Refractories Company, 215 NLRB 785, 786 (1974). Further, the negotiations were long, including 17 sessions over 6 months. In these sessions, however, discussion was often limited especially on the crucial question of wages. In fact, Respondent delayed specific discussion of wages until the March 2 meeting at which it made its first and last statement on the issue. Thus, length of negotiations does not support a finding of impasse. As to the importance of the issues of disagreement, here there is no ambiguity. Very serious issues concerning wages remain open at the point when the Respondent implemented the wage increase.

The final factor here, the contemporaneous understanding of the parties, is conclusive. It is well settled that

for impasse to be found the parties must have reached "that point of time in negotiations when the parties are warranted in assuming that further bargaining would be futile." Patrick & Company, 248 NLRB 390, 393 (1980). In this case, the movement on the part of the union throughout the bargaining and especially prior to the April 22 wage increase cannot justify the Respondent's conclusion that the parties were deadlocked.

Clearly, the Union did not believe negotiations were at impasse. Further, there is sufficient objective evidence to justify its belief. On April 15, the Union offered a proposal which showed movement on its part in important areas of dispute. The wage offer it made was the first "on the record" proposal of what the Union had intimated would be

acceptable to it at the February 20 meeting between the parties' chief negotiators.[6] It was coupled with other proposals, many of which had been made before. The repetition of proposals made before is not sufficient to nullify the real concessions that the Union was offering.

In Yama Woodcraft, Inc., d/b/a Cal-Pacific Furniture Mfg. Co., 228 NLRB 1337 (1977), the Board found that the willingness of a party to make concessions in some areas suggested a willingness to make further concessions in order to reach

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6 The Respondent contends that this is not a concession on the Union's part because it had been aware that such a proposal was acceptable after the February 20 meeting. We disagree. The Union's wage offer of April 15 offered now "on the record" and in conjunction with other proposals was a new offer on the Union's part and one showing a significant concession.

agreement. The other party is not justified in concluding that negotiations are at impasse simply because concessions have not been made in the area it finds most crucial or the concessions themselves have not been sufficiently generous. The Union's concessions with regard to wages and union security were significant enough to reasonably suggest that further concessions might be forthcoming. The Respondent's conclusion that a deadlock existed in the face of such concessions is unwarranted, particularly since the Union's proposal of April 15, which contained concessions, was its initial response to Respondent's first and only wage proposal.

In these circumstances, we find the parties were not at impasse when Respondent instituted unilateral wage increases, and that Respondent's action,

therefore, circumvents the duty to bargain in violation of Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Saunders House, a/k/a The Old Man's Home of Philadelphia, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. December 16, 1982

John H. Fanning, Member

Howard Jenkins, Jr. Member

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD-323-82
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SAUNDERS HOUSE a/k/a
THE OLD MAN'S HOME OF
PHILADELPHIA

and Case 4-CA-12047

DISTRICT 1199C, NATIONAL
UNION OF HOSPITAL AND
HEALTH CARE EMPLOYEES,
DIVISION OF RWDSU, AFL-CIO

William Slack, Esq. and
Scott E. Buchheit, Esq.,
of Philadelphia, PA, for
the General Counsel.
Miriam L. Gafni, Esq., of
Philadelphia, PA, for
the Charging Party.
Jacob P. Hart, Esq., of
Philadelphia, PA, for
the Respondent.

DECISION

Statement of the Case

MARVIN ROTH, Administrative Law Judge: This case was heard at Philadelphia, Pennsylvania, on March 10, 1982. The charge was filed on April 22, 1981

by District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO (herein the "Union"). The complaint, which issued on October 27, 1981, alleges that Saunders House, a/k/a The Old Man's Home of Philadelphia (herein the "Company" or "Respondent"), violated Section 8(a) (5) and (1) of the National Labor Relations Act. The gravamen of the complaint is that on or about April 22, 1981, the Company granted wage increases of up to 6 percent to employees in the appropriate bargaining unit, allegedly without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the unit employees with respect to such matter. The Company's answer denies the commission of the alleged unfair labor practices. All parties were

afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. General Counsel, the Company and the Union each submitted a brief. The Company also submitted proposed findings of fact, and a request that certain portions of the briefs submitted by General Counsel and the Union be disregarded.

Upon the entire record in this case 1/ and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs and other submissions of the parties, I make the following:

1/ General Counsel, the Company and the Union have each filed a motion to correct transcript. The motions coincide in some respects, but also conflict in a few respects. My rulings are contained in a separate order annexed to this Decision. With regard to requested corrections on pages 54 and 63, my independent recollection is, and my notes so indicate, that the witness said "four

per cent" and not "forty cents." With regard to requested corrections on pages 136 through 139, I find that corrections are warranted in the context of the documents referred to by the witness. In resolving conflicts over statements made or questions propounded by counsel during the course of the hearing, I have proceeded on the premise that the attorney who made the utterance is in the best position to know what he or she said. In the absence of any position by counsel for General Counsel as to his precise words at page 153, line 7 of the transcript, and in the absence of any independent recollection by me of his precise words, I am leaving the transcript uncorrected in this regard. However it is evident that he was referring to the present charge.

Findings of Fact

I. The Business of Respondent

The Company, a non-profit Pennsylvania corporation, is engaged in the business of providing long-term health services at its Philadelphia, Pennsylvania facility. In the operation of its business, the Company annually receives gross revenues in excess of $1,000,000, and annually purchases and receives goods and materials valued in excess of $50,000 from firms within Pennsylvania which in turn purchased and received such goods and materials directly from points outside of Pennsylvania. I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. See, East Oakland Community Health Alliance, Inc., 218 NLRB 1270, 1271 (1975).

II. The Labor Organization and the Bargaining Unit Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act. On August 28, 1980, following a Board-conducted election on July 3, 1980, 2/ the Union was certified as collective-bargaining representative of the employees in the following appropriate unit:

> All full and regular part time service, maintenance and technical employees including dietary, housekeeping, maintenance and nursing including nursing aides, licensed practical nurses and licenced graduate practical nurses employed by the Company at its Lancaster Avenue, Philadelphia, Pa. facility; excluding all other employees including professionals, managers, chefs, registered nurses, office clerical, guards and supervisors as defined in the Act.

The Company in its answer denies that the Union is the collective-bargaining representative of the unit

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2/ All dates herein are for the period from July 1, 1980 through June 30, 1981 unless otherwise indicated.

employees. No evidence was offered in support of the Company's position in this regard. However I was informed off the record that decertification petitions were dismissed by reason of the present proceeding.

III. The Alleged Unfair Labor Practices

A. The Facts

This case presents threshhold questions as to the extent and manner in which the evidence adduced in this proceeding, and in particular, the course of negotiations between the parties, may be considered with respect to the ultimate issue of whether the Company granted wage increases on April 22, 1981 without affording the Union an opportunity to negotiate and bargain with respect to such increases. Before addressing these questions, and the ultimate merits of the case, I shall first review the operative

facts, i.e., the course of contacts and negotiations between the Company and the Union during the period from July, 1980 to July, 1981, and the Company's actions with regard to the matter of wages during this period.

By letter dated August 12, 1980 (after the election but before certification), Union president Henry Nicholas requested contract negotiations and also requested the Company to furnish certain information. By letter dated August 13 which crossed in the mail, Company attorney Frank Abbott, who subsequently served as the Company's chief negotiator throughout the unsuccessful contract negotiations, informed Union attorney Miriam Gafni that the Company intended to implement an 8-percent wage increase for each unit employee, effective August 29 and retroactive to July 1. Abbott

informed Gafni that this would be similar to increases previously given to the Company's nonunit supervisory and administrative personnel. Abbott testified that the Company did not previously implement these increases for the unit employees because of concern that the Union might file objections or unfair labor practice charges and the election would be set aside. By letter dated August 15, Gafni told Abbott in sum, that any wage increase would have to be negotiated, that Nicholas had requested negotiations, that Nicholas was the Union's chief negotiator, and that the Company should submit its request to Nicholas. That same day (August 15) the Company sent a written notice to each of the unit employees, with a copy of Abbott's August 13 letter attached to each notice. The Company asserted that "/b/ecause of the

recent election we felt that the law prevented us from passing on this well-deserved increase previously," and that "/a/ssuming that the Union does not object, your next paycheck will be based on your new pay rate." By letter dated August 21 to Nicholas, Abbott responded to Nicholas' letter of August 12 and Gafni's letter of August 15. Abbott asserted that the requested information was being compiled, that because of the Union's objection the Company would not implement the wage increase, and that Nicholas should call him to arrange a meeting. (There is no contention in this case that the requested information was not furnished.) Thereafter Nicholas and Abbott arranged for negotiations to commence on September 16. In the meantime, on August 25, the Company sent another notice to its employees, this time with a copy of

Gafni's August 15 letter attached to each notice. The Company asserted that "/w/e had hoped to implement your increases," but "we have been prevented by the Union from effectuating your increases," and /w/e hope to be able to give you the increases in the near future."

On September 9 the Union forwarded its initial proposed contract (identified in the record as Joint Exhibit 5(b)) to attorney Abbott. 3/ The Union proposed,

3/ Another union-proposed contract (Joint Exhibit 9) was also presented in evidence but without stipulation as to the date of its submission. Nicholas testified without contradiction that Joint Exhibit 9 was the Union's original proposal. However he also testified that Joint Exhibit 5(b) was the Union's initial proposal. Joint Exhibit 9 contains language which was obviously taken from the Company's initial proposed contract. It is evident that Joint Exhibit 9 was prepared during negotiations and reflects acceptance of some of the Company's proposed language. I find that Joint Exhibit 9 was submitted to the Company some time between September 24 (the second bargaining session) and December 2, when the Union first revised its wage proposal.

inter alia, full union security and check-off of union dues and initiation fees. On wages, the Union proposed a $40 per week wage increase "to be applied across the board and in the minimum job rates" (effective date not indicated). The Union also proposed cost-of-living increases (COLA) on a scale ranging up to a maximum of five dollars per week. The proposed contract was open as to duration.

The parties met in 6 negotiating sessions during the period from September 16 to April 15. After the wage increases which are the subject of this proceeding, the parties met in two more sessions (July 29 and August 25, 1981). However no evidence was introduced as to the substance of those last two sessions. As indicated, attorney Abbott was the Company's chief negotiator throughout the negotiations. Union president Nicholas

was the Union's chief negotiator during the first 3 sessions. Union executive vice president Donna Ford replaced Nicholas at the fourth session on October 29, and continued as chief negotiator until Nicholas returned to the negotiations in March 1981. Nicholas, Ford and Abbott were the only witnesses to testify in this proceeding. General Counsel presented Nicholas and Ford as witnesses, and the Company presented Abbott as its witness.

The testimony of Nicholas and Abbott is partially in conflict concerning the first session on September 16. According to Abbott, he asked if the Union was still opposed to the 8-percent increase. Nicholas answered that they were unless the increase was part of an overall contract package. Nicholas pointed out that the Union had just submitted an economic proposal. Abbott testified that

he restated the Company's position as set forth in his August 13 letter to attorney Gafni and suggested that the parties were at "impasse." According to Abbott, Nicholas agreed with this assessment. Abbott promised to submit the Company's proposed contract at the next session. Nicholas testified that Abbott proposed the wage increase on a "take it or leave it" basis, asserting without explanation that the Union had prohibited the employees from getting it. According to Nicholas, Abbott said nothing at this meeting about the Company having given a raise to non-union personnel or delaying an increase for unit employees because of the election. Nicholas testified that when Abbott suggested they were at impasse, he disagreed, arguing that there could be no impasse because the increase would be a gift and not a part of the

negotiations.

I credit Abbott's version of the September 16 session. His version is more credible than that of Nicholas. If Abbott, as testified by Nicholas, had asserted that the Union prohibited the employees from getting a wage increase, then it is probable that Nicholas would have asked for an explanation, and it is also probable that Abbott would have given an answer which included the reasons previously asserted by Abbott in his letter to Gafni. If Nicholas had denied that there was an impasse, then it is unlikely that the Company would (as it did) implement the increase on September 26 without even mentioning the matter at the second session on September 24. Additionally, the Company's announcement and explanation of the increase (which will be described, infra) was consistent with

Abbott's version of the September 16 session, but not with that of Nicholas. If Nicholas had asserted that the increase should be regarded as a gift, then it is probable that the Union would have expressed its disagreement with the Company's explanation, by way of communication to the Company or the unit employees or both. However there is no evidence that it did so.

On September 19 the Company submitted its initial proposed contract to the Union. The proposal did not provide for either union security or checkoff, and did not contain any wage proposal. On wages, the Company indicated that its wage proposals would follow. The proposed contract was open as to duration, although it indicated that the effective date would be in 1980 and the terminal date in 1981. At the second session on

September 24 the parties discussed the Company's proposed contract. Nicholas indicated which proposals were acceptable to the Union and which were objectionable. At this session and thereafter, the Company asked to defer discussion of economic matters. There was no discussion about the proposed 8-percent wage increase or the Union's economic proposals. However, on September 26 the Company, without further notice to the Union, granted an 8-percent wage increase to the unit employees, retroactive to July 1, 1980. The increase was identical with that given to nonunit personnel on July 25, 1980. The Company informed the unit employees that "the Union wanted us to wait until the end of negotiations," but "we feel that you should not have to wait any longer." The Union filed an unfair labor practice charge regarding the increase.

Subsequently General Counsel and the Company, over the Union's objection, executed an informal Board settlement agreement in the matter. The settlement agreement was not presented in evidence in this proceeding.

At the third session on October 8, the parties went through the various provisions of their respective proposals. Nicholas informed Abbott that the Federal Mediation Service (FMC) had assigned Commissioner Christine Sickles to the negotiations. Thereafter Sickles was in attendance at the negotiations, which were conducted at the FMC offices (The first 3 sessions were held at Abbott's law offices). At the fourth session, Donna Ford replaced Nicholas as the Union's chief negotiator. According to Abbott, the parties were moving slowly but making some progress on matters of

language. At the fifth negotiating session on November 5 and the sixth session on November 12, the parties again discussed matters of language. There were concessions on both sides. At the seventh session on November 24, Mediator Sickles spoke privately to Ford and Abbott. Sickles said that they were not making much progress, and asked what could be done to speed up the negotiations. Ford said that the Company had to do something on wages, union security and checkoff, and until the Company moved on these matters, there would not be much progress. When they returned to the full session, Ford asked for the Company's position on wages, union security and checkoff. Abbott asserted that the parties had discussed wages, that the Company had promised to submit a proposal and that the Company would submit a wage

proposal at the next session. As to union security and checkoff, Abbott said, "the answer is still, no." Ford replied that she couldn't proceed further until the Company moved on these matters. In fact, except for the discussion at the first session concerning the proposed 8-percent wage increase, there had been no substantive discussion whatsoever concerning the matter of wages. Indeed, Abbott conceded in his testimony that the Company did not even consider the Union's initial wage proposal. Abbott testified that he said nothing about the Union's proposal for a $40 per week increase because "I never took that serious"; and with respect to Ford's complaint that the Company never made a proposal on wages: "let's say that I never considered them as having made a proposal either." As to union security and check-

off, there was only minimal testimony concerning the substance of the parties' discussions, i.e., the reasons given by them in negotiations for their respective positions. Nicholas testified that the Union regards union security as the "salvation of the union," and so made clear to the Company. According to Nicholas, the Union (as will be discussed, infra) subsequently proposed a modified form of union security, in order to avoid a strike. The only evidence presented concerning the Company's asserted reasons for rejecting union security and checkoff consists of a letter from the Company to the unit employees, dated March 25, 1981, and a letter sent by Abbott to the Board's Regional office in connection with the investigation of the present charge. In the former, the Company asserted that it "took the position that

we will not agree to union security because we feel that people do not have to join the Union to work at Saunders House," and that on dues checkoff "we do not feel that it is Saunders House's responsibility to take dues out of any employee's pay and send it to the union." In his letter to the Regional Office, attorney Abbott set forth the Company's asserted position before a Board of Inquiry (Rev. Dr. Francis X. Quinn, Chairman), on March 16, 1981. According to Abbott:

> The parties met in Federal Mediation again on March 30, 1981 to consider Dr. Quinn's report. At that meeting both parties agreed that they were at impasse. Saunders had pointed out to Dr. Quinn on March 16th that, as of March 10, 1981, 29 employees who had voted no longer were employed at Saunders and had been replaced. As a result, not knowing the desires of those employees and knowing that many of its employees had not wanted to join the Union at the time of the election, Saunders informed Dr. Quinn that it did not wish to agree to require any of its

employees to become members of the Union, nor would Saunders collect dues for the Union. Saunders indicated it had no objection to employees voluntarily joining the Union since that was their right. Saunders maintained this position.

At the eighth session on December 2, each side orally submitted a wage proposal. The Union proposed across-the-board wage increases of $20 per week, effective September, 1980, $18 per week effective September 1, 1981, and $18 per week effective September 1, 1982, plus a cost-of-living adjustment in the second year of the contract. The Company proposed a one year contract, effective as of the date of ratification, and a cost-of-living adjustment, effective July 1, 1981, in accordance with the formula set forth in the Union's proposed contract. 4/

4/ Abbott initially testified that he opened the December 2 session by submitting the COLA proposal. However on cross-examination Abbott testified that

he was not sure whether he made the proposal on December 2 or on December 8. I find, as indicated by the testimony of Ford, that the Company submitted its proposal in response to the Union's proposal.

According to Ford, the Company said that they were not prepared to discuss wages; that "anything they agreed upon" would be effective upon the date of the contract, and that they would be willing to include a cost-of-living increase in the second year of contract. Abbott, in his testimony, denied that he said anything about a wage increase to be granted at the time the contract was ratified. (Indeed, Ford did not testify that Abbott expressly made such a reference.) However Abbott did not deny the balance of Ford's testimony. I credit Ford's testimony that the Company said that they were not prepared to discuss wages. I find that the Company thereby precluded any meaningful discussion and negotiation concerning the wage proposals which were on the table. I further find that the Company thereby also led the Union to believe that the

Company's wage proposal was incomplete.

The evidence fails to indicate that wages were discussed at the ninth session on December 8, the tenth session on December 22, or the eleventh session on January 26. Ford testified that neither party submitted or proposed anything on wages at these meetings, and Abbott did not testify concerning the three meetings. Ford's testimony concerning the twelfth session on February 6 was undisputed. Ford and Abbott discussed where the parties stood. Ford outlined those issues which were important to the Union, and described as "crucial," union security, checkoff, union visitation, sick leave and wages. According to Ford, "we agreed that we would put together a proposal as to where each party was; and that he /Abbott/ was going to go back and talk to his clients

in reference to those areas that were of importance to us and that I was to meet him at his office to review it."

Pursuant to their agreement, Ford and Abbott met alone in Abbott's office on February 20. 5/ In contrast to the February 6 session, the testimony concerning this meeting is sharply disputed. According to Ford, the meeting lasted about 10 minutes, Abbott said that he could not get the Company to move on anything and suggested another session, and the parties did not discuss wages or any other specific matter. Abbott testified that the meeting lasted about one-half

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5/ The meeting was initially scheduled for February 11. Abbott testified that Ford cancelled the earlier date. Ford testified that Abbott cancelled the February 11 meeting, apparently because he was angry over remarks made by union president Nicholas at a meeting with employers, concerning alleged problems with employer attorneys. I find it unnecessary to resolve this conflict in testimony.

hour. According to Abbott, the parties reviewed their positions. Ford said that she would recommend to the membership a contract which contained modified union security, checkoff and three successive annual wage increases of 8-percent each. Abbott further testified that he told Ford he would discuss her position with the Company, but that they probably would not agree, and that he would present a wage proposal at the next bargaining session. (In fact, the Company did present a wage proposal at the next session). It is undisputed that Abbott never mentioned the February 20 meeting in subsequent negotiations, or in the Board of Inquiry proceeding, or in the letters which he sent to the Regional Office in connection with the investigation of this case. Abbott explained that he regarded the meeting as "off the record," i.e.,

"in confidence," and that he would not even have mentioned the meeting in this proceeding if Ford had not testified concerning the meeting.

I credit Abbott. Specifically, I find his version of the February 20 meeting to be more plausible than that of Ford. It is unlikely that Abbott would have gone ahead with the meeting if had nothing more to say than that the Company was not willing to move on anything. Rather, it is more probable that Abbott would have simply telephoned Ford and told her of the Company's position. It is also unlikely that Abbott would have told Ford that the Company was unwilling to move on anything and then (as he did) present a new wage proposal at the next bargaining session. Additionally, it is evident that Ford and Abbott attached particular importance to their private

meeting. In these circumstances, it is unlikely that they would have utilized the meeting simply to speak in generalities, without discussing their positions on specific important issues, and in particular, wages, union security and checkoff. 6/ I find that at the February

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6/ I am not persuaded by the arguments advanced by General Counsel and the Union as to why I should credit Ford rather than Abbott. The Union argues (Br. 10) that "it is hardly imaginable that the union would have offered a package of 8%, 8% and 8% when there wasn't one penny on the table from the Employer for any of the periods in question" and the Company was proposing a one year contract. In fact, there was a Company wage proposal on the table at this time, and the Union previously reduced its wage demands at a time when the Company had not presented any wage proposal. It is not inherently improbable that one negotiator would, in confidence, indicate to the other negotiator a probable "bottom line" for the conclusion of negotiations, nor is it improbable that the other negotiator would honor such confidence and thereafter not mention their conversation in subsequent negotiations or proceedings. Moreover, Abbott's letters to the Regional Office , like Company counsel's opening

argument in this proceeding, did not purport to set forth a detailed recitation of the negotiations from the Company's point of view. Rather they simply contained a brief statement of the Company's position, principally that the parties themselves agreed that there was an impasse. Therefore, even if Abbott were inclined to divulge his confidential conversation with Ford, I would not regard the absence of any reference to the February 20 meeting as an admission that the meeting did not take place as described by Abbott in his subsequent testimony.

20 "off the record" meeting, Ford informally indicated to Abbott what she thought would be the Union's bottom line for an acceptable contract. The significance of this meeting will be further discussed at a later point in this Decision.

On February 26 the Union gave written notice to the Company of its intent to strike (pursuant to Section 8(g) of the Act). However the Union never struck the Company. At the thirteenth negotiating session on March 2, the Company presented a revised proposed contract, including a proposed wage schedule. 7/ The Company proposed a termination date of September 30, 1981. The Company's

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7/ Ford testified that the Company presented only the wage proposal at the March 2 session, and first presented the balance of its revised proposed contract at the Board of Inquiry hearing on March 16. Her testimony was contrary to the stipulated evidence.

wage proposal indicated an effective date of March 12, 1981. Therefore the Company was proposing a contract of about 6½ months duration, or less, depending on the length of negotiations. The revised proposed contract reflected some concessions on matters of language, but did not provide for either union security or checkoff. The Company's wage proposal was set forth in terms of rates of pay by job classification and for each individually named employee in the unit. Abbott explained that under the proposal, the Company would give individual raises, effective March 12, 1981, and averaging 6½-percent, and would give a general 6-percent increase to all unit employees effective July 1, 1981. The general increase would be in lieu of the Company's former proposal on COLA, and would not apply to job rates in the progression

scale. The proposed March 12 raises varied widely, ranging from 55-cents per hour down to nothing. Among the approximately 165 unit employees, 14 would receive no raises and 32 would receive raises of 10-cents or less per hour. For a few employees, the raises amounted to more than 10-percent. However, according to union president Nicholas, he analyzed that about 20-percent of the employees would receive raises of less than 4-percent. Abbott asserted that the Company had made a study of wage rates and based on the results of the survey, wished to upgrade employees where inequities existed. Abbott wanted to proceed through the proposal, discussing each individual employee, but Ford indicated that the Union wanted to study the proposal. A session was scheduled for March 5. However Ford indicated that the Union could

not accept any proposal which failed to provide for increases for all employees, and also that the Union did not agree with the proposed job rates.

Abbott testified that the proposed contract which he submitted to the Union at the March 2 session was the Company's "final offer," and the Company so informed the employees by letter the next day. (The letter also informed each employee of the increase or increases which he or she would receive under the Company's proposal.) In sum, the Company's first and only comprehensive wage proposal was, by the Company's own assertion, part of its "final offer," and was submitted at the first bargaining session at which the Company even impliedly indicated that it was prepared to discuss the entire matter of wages.

At the fourteenth negotiating

session on March 5, Ford orally presented what she described as the Union's "final offer" on wages. Ford proposed an 8-percent wage increase effective September 16, 1980, a 10-percent increase effective July 1, 1981, and a 10-percent increase effective July 1, 1982. Ford said nothing about COLA, and Abbott assumed that the Union was dropping its demand for COLA. Abbott did not comment or ask questions about the Union's proposal, other than to state that there was no change in the Company's position. Abbott testified that he knew by reason of his meeting with Ford on February 20 that this was not the Union's final offer, and that the Union would come down on wages and also move on union security. At the close of the March 5 session, mediator Sickles informed the parties that FMC would appoint a Board of Inquiry, and

that the Board would conduct a hearing on March 16.

Dr. Quinn presided at the Board of Inquiry hearing. Union president Nicholas spoke on behalf of the Union. Nicholas presented the Board with the Union's last written proposed contract (Joint Exhibit 9) and with a typed outline of what he regarded as the unresolved issues between the parties (Joint Exhibit 10). The outline indicated in sum, that the outstanding items included full union security, checkoff, superseniority for delegates, vacation (number of days), holidays (3 issues), grievance procedure (guaranteed hearing at each step with no loss of wages), wages, successorship, union activity (including compensation), recognition (definition of part-time employees included in the unit), hours of work (concerning weekend work and grace

period for tardiness), overtime (counting holidays as time worked), probationary employees (length of probationary period), sick leave (4 issues, including sick leave from first day of illness vs. third day of illness), paid leave (2 issues), leave of absence (extent of employer discretion and rights on return), and contract termination date. (The Union wanted a termination date of September 1, 1982.) The parties were also in disagreement on two non-contractual union demands, namely, reinstatement of two terminated employees (Cox and Taylor) and compensation for members of the Union's negotiating committee. On wages, the Union indicated (notwithstanding its March 5 proposal) that it was seeking annual raises of 8, 10 and 10-percent plus COLA.

Nicholas then made an oral presentation. He asked the Board to limit its recommendations to the matters of union security, checkoff, union visitation rights, grievance procedure, wages, contract duration, and reinstatement of Cox and Taylor. Nicholas indicated that if the Union "could get a green light on those issues," i.e., if the Board recommended the Union's position on those issues and the Company accepted the recommendation, the Union would, as Nicholas put it, "take the contract and run like a thief with it." Abbott then made a presentation on behalf of the Company. He furnished the Board with the Company's March 2 proposed contract. Abbott clarified the Company's position in certain respects, but did not indicate any willingness to move from its March 2 proposal. On March 20 the Board of inquiry issued its written fact finding

report, including non-binding recommendations. The Board recommended a contract termination date of August 31, 1982, modified union security, checkoff of dues and initiation fees, and an 8-percent across-the-board increase effective September 1, 1981.8/ The Board did not make recommendations on any other issues.

By letter dated March 25 (mentioned, supra, in connection with the Company's position on union security and checkoff), the Company informed the employees that it was unable to implement its proposed wage increases because the Union did not accept the Company's wage offer. Ford and Abbott were the chief negotiators at the

8/ On union security, the Board recommended a clause which would exclude from the requirement of union membership, non-members actively employed by the Company on the effective date of the contract.

fifteenth bargaining session on March 30. Ford indicated that the Board of Inquiry recommendation on wages was unacceptable to the Union, but that the Union could go along with modified union security. There was no express reference to contract duration or reinstatement of Cox and Taylor. According to Abbott, Ford said that the Union would agree to a modified union shop if the Company agreed to the balance of the Union's proposals as set forth by Nicholas in his oral presentation to the Board of Inquiry. Abbott responded that the Union had the Company's "final position." He asserted that the Company's wage proposal was more favorable to the employees than the recommendation of the Board of Inquiry. In her investigatory affidavit, Ford stated that she told Abbott that if the

Company accepted the Board of Inquiry recommendations, the Union would discuss the remaining open issues. However in her testimony she admitted that this was not true. I credit Abbott.

Nicholas and Abbott were the chief negotiators at the sixteenth negotiating session on April 15. Ford was also present. This was the last session before the Company implemented its proposed individual wage increases. Nicholas presented a written document purporting to set forth "recommendations. . . as a way to end the impasse between the parties . . . in the hope of reaching a conclusion to the longest negotiations in the Union's history." The Union proposed modified union security, checkoff as originally proposed by the Union, general wage increases of 8-percent,

effective respectively on September 16, 1980, July 1, 1981 and July 1, 1982 (No mention of COLA), guaranteed hearings at each step of the grievance procedure, the Union's proposed language on union activity (Article 20), and sick leave beginning on the first day of illness. Nicholas also made an oral presentation of the "recommendations." Nicholas confirmed that he was dropping the demand for COLA, and that if the Company accepted these proposals, the Union would accept the Company's proposals in all other respects and thereby conclude the negotiations. Abbott asked whether the Union's proposal on sick leave was based on the Union's proposed article or the Company's proposed article (with sick leave from the first day instead of the third day of illness). Nicholas answered that it was the Company's article.

Abbott also asked for clarification on the grievance procedure. Nicholas answered that the Union wanted at step 2, employee opportunity to meet with the personnel director, and at step 3, employee opportunity to meet with the executive director. There was no other discussion of substantive matters. The Company caucused, and then told the Union that they wanted to study the proposal, and would get back to the Union. In fact, as admitted by Abbott in his testimony, the Company had already decided to reject the proposal. According to Abbott, the Company concluded that there was nothing new in the Union's proposal because (1) the Company knew that modified union security was available, (2) the Union had always wanted checkoff, (3) the Company had long known that the Union would settle for three 8%

wage increases, (4) the Union's proposal on grievance procedure was "not clear to us," (5) the Union had insisted all along on its proposed article on union activity, and (6) the Union's proposal on sick leave also did not reflect any change in the Union's position.

As to sick leave, Abbott was equivocal about the extent of prior agreement. Abbott testified that the parties were in "basic agreement" on most aspects of sick leave, but he subsequently testified that he didn't know whether as of March 16, there was agreement on all aspects of sick leave except first day vs. third day of illness. In fact, as indicated by Nicholas' outline of issues, and as further indicated by a comparison of the parties' proposed contracts (Article 11 in both proposals) the parties differed on 4 matters under sick leave.

Indeed, Nicholas understated the extent of the difference (Nicholas indicated that the Union wanted 12 days per year and the Company was proposing 10. In fact, as testified by Donna Ford, the Company was proposing 7 days). In Nicholas' oral presentation to the Board of Inquiry, he did not include sick leave as one of the crucial demands. However, on April 15 he lowered the amount of the wage proposal and dropped the demands for COLA and for reinstatement of Cox and Taylor. Also, on March 30 the Union indicated that it would agree to modified union security. On grievance procedure, the Union, in response to the Company's inquiry, explained its proposal. What is mystifying, however, is that the language of the Company and Union proposals on steps two and three of the

grievance procedure are identical. Neither expressly spells out a right to a meeting. Even the Union's initial proposed contract did not expressly spell out such a right. It may be that the Union interpreted the language as providing such right. However the Company did not inquire into this problem. Instead, as indicated by Abbott's testimony, the Company dismissed out of hand the Union's proposal for language identical to that in the Company's proposed contract, simply because the Union's proposal was "not clear to us." On union activity, the areas of difference concerned the extent of access and compensation for time spent on union activity. As to wages, the proposed 8-percent wage increases would contribute nothing new only if Ford's "off the record" conversation with Abbott

constituted a union proposal. However, the Company never acknowledged it as constituting a proposal and never discussed it with the Union.

By hand-delivered letter dated April 16 to Nicholas, Abbott asserted that the Company had considered the Union's "recommendations," that they represented no change in the Union's position, except for guaranteed hearings under the grievance procedure, that the Company's proposed article on union activity adequately covered that point, and that "our offer remains unaltered." Abbott stated that the parties agreed that they were at impasse, and that the Company would implement wage increases and other elements of its proposal unless the Union accepted that proposal by April 22. By letter dated April 20, Nicholas disagreed with Abbott's

assertion that there was no change in the Union's position, and objected to any "unilateral" wage increase, arguing that such would constitute an unfair labor practice. Abbott attempted to reach Nicholas by telephone on April 21 and 22. He was unsuccessful, and on April 22 he sent a hand-delivered letter to Nicholas which substantially restated the Company's position as set forth in Abbott's April 16 letter. By hand-delivered letter dated April 22 to Abbott, Nicholas restated the Union's position. Nicholas testified that he did not return Abbott's phone calls because he wanted his answer to be "on the record." As the Company did not offer to resume negotiations, I attach no significance to Nicholas' failure to return Abbott's calls.

The Complaint alleges and the answer admits that on or about April 22, the

Company granted wage increases of up to 6-percent to employees in the bargaining unit. There were no further bargaining sessions until July 29, 1981. In the meantime, by letter dated July 1, 1981, Abbott informed Nicholas that notwithstanding the Company's last offer of a 6-percent wage increase effective July 1, 1981, the Company intended to give an 8-percent increase to nonunit personnel effective as of that date, and wanted to give the same increase to the unit employees. This was also the same increase which the Union had proposed at the April 15 session. Abbott added that "_/ if_7 you have any comments concerning this matter, please advise us before July 10, 1981." Abbott gave no explanation as to why the Company did not previously offer or agree to an 8-percent increase effective July 1, 1981. By

letter dated July 6, 1981, attorney Gafni, on behalf of the Union, told Abbott that there was no impasse, and that any unilateral increase in benefits without prior negotiations" would be unlawful. Gafni requested resumption of contract negotiations. No evidence was presented as to whether the Company implemented any wage increases, or as to what if any substantive negotiations took place thereafter between the parties.

B. Analysis and Concluding Findings

1. The extent to which the course of negotiations and the Company's actions may be considered in this proceeding.

General Counsel and the Union allege in their respective briefs that the April 22 wage increase was unlawful, inter alia, because the Company engaged in bad faith bargaining. The Company has requested that I disregard that

argument, on the ground that good faith is not an issue in this proceeding.

On June 8, 1981, the Board's Regional Director informed the Company and the Union that he would not proceed on allegations of the present charge other than the allegation that the Company unlawfully unilaterally instituted its wage proposals. Specifically, the Regional Director administratively found, as lacking in merit, allegations that the Company "bargained without any intention of reaching agreement," and improperly "dealt directly with the employees," by its letters to the employees in March, 1981. The present record does not indicate that the Union requested the Board's General Counsel to review the Regional Director's action. During the opening arguments in this proceeding,

counsel for General Counsel asserted that "there was good faith bargaining" but "no impasse," that he would focus on wages, that the September 1980 wage increase was not the subject of this proceeding, and that he was not alleging any unlawful increase in July, 1981. However Company counsel argued that he had "no problem with developing the totality of negotiations because I think that under the leading Board cases, to discover whether any impasse exists/s/ as to any subject, you must look at the totality of negotiations," Indeed, the Company took this approach in its brief.

The principal difficulty with the Company's present request to exclude good faith as an issue, is as the Company has acknowledged by its arguments, that good faith is an element which must be considered in determining whether the Company

acted lawfully in implementing the April, 1981 wage increases. The present complaint alleges that the Company violated Section 8(a) (5) and (1) of the Act by granting the wage increases "without having afforded the Union an opportunity to negotiate and bargain" regarding the grant of those increases. Essentially, the factual question presented by the evidence is whether the Company was privileged to make those wage changes by reason of an impasse in bargaining. As a general rule, an employer is permitted to make unilateral changes in terms and conditions of employment when there is an impasse in negotiations regarding the subject matter or matters in question, i.e., when despite their best efforts to achieve agreement with respect to such matters, neither party is willing to move from its respective position. Hi-Way Billboards,

Inc., 206 NLRB 22, 23 (1973), rev'd. on other grounds, 500 F.2d 181 (CA 5, 1974). However such changes must be reasonably comprehended within the employer's pre-impasse proposals. Whether such an impasse exists is a matter of judgment. The relevant factors in making that judgment include the bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. Taft Broadcasting Company, 163 NLRB 475, 478 (1967), aff'd. sub. nom., American Federation of Television & Radio Artists v. N.L.R.B., 395 F.2d 622 (CADC), (1968). Therefore, good faith must be considered in determining whether there was an impasse, and consequently on the ultimate merits of the complaint. The Company is

not prejudiced by the permissable scope of inquiry. As indicated, the Company made clear in its opening argument that it understood the "totality of negotiations" to be a proper area of inquiry in this proceeding, and that it was prepared to litigate the case on that basis. Therefore the Company was on notice that its course of dealings with the Union was an issue and might give rise to the finding of a violation of its duty to bargain. See, Griffin Inns, Owner and Operator of Sheraton Motor Inns, 229 NLRB 199 (1977). I find that the permissable scope of inquiry in this proceeding includes the entire course of negotiations between the parties and the Company's related actions which were the subject of testimony or other evidence, from July, 1980 through July, 1981. This includes the September 1980 wage increase, because evidence in a

settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement, and which are in litigation. Steves Sash & Door Company v. N.L.R.B., 401 F.2d 676, 678 (CA 5, 1968). However the statements made by General Counsel in its opening argument, may be and have been taken into consideration as admissions against interest.

2. The merits of the present Complaint

Notwithstanding the foregoing discussion, a finding of unlawful conduct is warranted in this case, even if the Complaint were construed in its most literal or technical sense. Specifically, the Company acted unlawfully because it never negotiated or bargained with the Union over the matter of wages, or even afforded the Union an opportunity to negotiate or

bargain about wages. This is true, whether the subject matter in question is viewed as wages or as a particular wage increase. When the Union submitted its initial proposed contract, including wage proposals, the Company asked to defer discussion of economic matters (notwithstanding that it had already implemented its own proposed wage increase). The Company continued to adhere to this position until the eighth session on December 2, when the Union substantially reduced its wage proposal and the Company submitted a proposal on wages. In the meantime, as admitted by attorney Abbott, the Company did not even bother to consider the Union's initial proposal. On December 2 the Company again asked to defer the matter of wages by asserting that it was not prepared to discuss wages, and by leading the Union to believe that its

wage proposal was incomplete. Thereafter there was no specific discussion of wages until the "off the record" meeting between Abbott and Ford on February 20. The Company never responded to Ford's statements at this meeting. However, according to the testimony of Abbott, the Company never considered any union wage or proposal which called for anything more than 3 annual wage increases of 8-percent each, because the Company knew the Union would settle for less. When (on March 2) the Company finally got around to presenting its wage proposal, the proposal was presented as a non-negotiable item. Specifically, the Company presented its wage proposal on a take it or leave it, all or nothing basis, as part of the Company's "final" proposed contract. At the next session on March 5, the Union presented what it described as its "final

offer" on wages. However the Union subsequently indicated that the offer was not final, and that the Union was willing to reduce its demands in order to reach an agreement. In contrast, the Company on and after March 2 indicated that it meant what it said, and that it would consider nothing less than union acceptance of its entire proposed contract of March 2. On April 15 the Union proposed what Abbott allegedly knew all along to be the Union's bottom line on wages. However, the Company did not even bother to respond to the proposal. Instead, the Company falsely told the Union that it wanted to study the proposal, although in fact the Company had already decided to reject the Union's proposal in its entirety. The next day the Company informed the Union by letter that it would implement its own wage proposals unless the Union accepted the Company's

entire proposed contract.

The Company cannot have it both ways. If, as indicated by Abbott's testimony, the February 20 meeting was "off the record," then Abbott should have disregarded the meeting and negotiated with the Union about those proposals which were presented at the bargaining table. If Ford's statements constituted a union proposal, then the Company was obligated under law to negotiate with the Union about this proposal. Instead, the Company did not pursue either alternative. A party does not meet its bargaining obligations under the Act by simply considering only its own proposals, or by consulting with its own chief negotiator. Nor does a party meet its bargaining obligations by avoiding a response at the bargaining table, and instead, presenting its position by way of a written ultimatum. Rather, as the

Board has made clear:

> Bargaining presupposes negotiations -- with attendant give and take -- between parties carried on in good faith with the intention of reaching agreement through compromise . . .
>
> Clearly this duty requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond. Such tactics amount to little more than a ritual or pro forma approach to bargaining and hardly constitute the 'kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement.'

Dilene Answering Service, Inc., 257 NLRB No. 24 (1981), citing Winn Dixie Stores, Inc., 243 NLRB 972 (1979).

Here, throughout the entire course of negotiations the Company avoided or rejected any meaningful discussion or negotiation concerning agreement on wages. Therefore, if for no other reason, there was no impasse in negotiations concerning

wages, and the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the proposed wage increases. The matter of wages was a crucial issue, and was one of only a handful of items which separated the parties as of April 15. Meaningful bargaining regarding wages might well have led to agreement on the remaining issues. Moreover, a party is obligated to bargain in good faith concerning a particular subject matter, such as wages, even if there is a genuine impasse in negotiations with respect to other matters. See, N.L.R.B. v. Tomco Communications, Inc., 567 F. 2d 871, 881-2 (CA 9, 1978). In fact, the Company's failure and refusal to meaningfully discuss the Union's wage proposal of April 15, also extended to other aspects of the Union's proposals, including the important issue of union

security. As indicated, attorney Abbott stated that he told the Board of Inquiry on March 16 that the Company opposed union security and checkoff because it did not know the desires of employees hired since the election, and it also knew that many of its employees had not wanted to join the Union at the time of the election. The Board of Inquiry's recommendation of modified union security, and the Union's subsequent acceptance of this recommendation in the form of its own proposal, was directly addressed to the Company's professed concern, and reflected a substantial departure from the Union's original proposal for full union security. Nevertheless the Company did not even bother to reply to the Union's significant movement in this area. Rather, when the Union first proposed modified security (March 30), Abbott

simply responded that the Union had the Company's "final position." When the Union again proposed modified union security (April 15), the Company falsely asserted that it would consider the proposals which were submitted at that meeting, and by letter the next day, falsely asserted that the Union's proposal did not reflect any change in the Union's position (My analysis of the February 20 meeting, supra, would apply to union security as well as wages). Therefore the Company failed and refused to engage in meaningful negotiations concerning union security and checkoff, and there was no impasse on these matters as of April 15. See, N.L.R.B. v. Webb Furniture Company, 306 F. 2d 314, 316 (CA 4, 1966). Similarly, the Company refused to acknowledge other significant changes in union position as reflected by

the Union's April 15 proposal, i.e., modification of the Union's proposals on sick leave and withdrawal of its demands for reinstatement of Cox and Taylor. The Union's April 15 proposals cut across the spectrum of differences between the parties. The Company failed and refused to negotiate concerning those proposals. Therefore there was no impasse in contract negotiations as of April 15, or on April 22, when the Company implemented its wage proposals.

I further find, upon consideration of the evidence, that there was no impasse in negotiations on April 15 or 22, because the Company failed to bargain in good faith with the Union over the terms of a collective-bargaining agreement between the parties. Rather, the evidence indicates that the Company entered negotiations with a fixed

intention of not reaching agreement on a contract. The Company's attitude is particularly illustrated by its positions and actions with regard to wages, i.e., the subject matter which is directly involved in this proceeding. I agree with General Counsel's argument (Br. 8) that the Company demonstrated "a propensity for undermining the Union's status through unilateral action." Before contract negotiations had even begun, the Company proposed to implement a general 8-percent wage increase. The Company notified the employees of its intention to grant the increase, before the Union had an opportunity to respond to the proposal. Such action in itself circumvents and disparages the Union and demonstrates bad faith in bargaining. Huck Manufacturing Company, 254 NLRB No.

88, n. 2 (1981). The Company proposed and implemented this wage increase notwithstanding its assertion (made as late as December 2) that it was not prepared to discuss wages. This excuse for preventing negotiations on a contract wage provision was demonstrably false. If the Company was able to formulate and implement a substantial wage increase, then it was able to discuss the matter of wages in the context of a proposed collective-bargaining contract. In April, 1981 the Company again unilaterally implemented wage increases. In July, 1981 the Company again proposed to unilaterally implement a general wage increase. This 8-percent wage increase exceeded the C mpany's last offer, and was the same increase which had been proposed by the Union to take effect on July 1, 1981.

The Company offered no explanation as to why it could not have accepted the Union's proposal in April. Over the course of the negotiations the Company proposed, at various times: (1) a general 8-percent increase, retroactively effective to July 1, 1980, (2) COLA in accordance with the Union's initial proposal (subsequently withdrawn and replaced by proposed individual increases averaging 6½ percent, and (3) a general wage increase of 8-percent, effective July 1, 1981. These proposals, viewed together, came close to meeting the Union's demands (of which Abbott was admittedly aware by February 20). 9/ If the Company submitted these

9/ It is possible that the Union was proposing an initial wage increase which would supplement, rather than constitute the same increase as that implemented by the Company in September, 1980. However the Company did not even bother to inquire as to the meaning of the proposal.

separate proposals in the form of a proposed contractual agreement, the parties might well have reached agreement at least on wages. Instead, the Company repeatedly submitted its wage proposals in the form of unilateral wage increases. In August, 1980 and again in March, 1981, the Company accompanied these proposals by letters to the employees in which it made clear that the Company, rather than the collective-bargaining process, should be regarded as the source of their benefits, and that everything would be fine if the Union would refrain from objecting to unilateral wage increases.

I further find that the Company manifested a lack of good faith in other areas of negotiation. On contract duration, the Company toughened its position while the Union was

substantially reducing its demands in an effort to reach agreement. The Company initially proposed a one year contract. However on March 2, the Company without explanation, proposed an expiration date of September 30, 1981 as part of its "final offer." At that point the duration of such contract would have been about 6½ months. The duration would have been less, depending on the length of negotations. The Company's proposal further demonstrated an intent to undermine the Union's representative status and a lack of good-faith bargaining. See Huck Manufacturing Company, supra, 254 NLRB No. 88, JD at 30, citing Insulating Fabricators, Inc., Southern Division, 144 NLRB 1325, 1329-30 (1963), enf'd. 338 F. 2d 1002 (CA 4, 1964). The Company also demonstrated bad faith in

the crucial areas of union security and checkoff. Union security and checkoff are (as here) matters of vital importance to a union, but which normally (assuming good faith) involve minimal interest, expense or inconvenience to the employer. A union is obligated under law to represent all of the employees in the bargaining unit. Without union security, the Union and its members are at the mercy of freeloaders who obtain the benefits of collective bargaining without any of the cost. Without checkoff, the Union and its membership are even at the mercy of union members who may stop paying dues simply because they happen to be dissatisfied with the resolution of a grievance or some other union action. The Union is also forced to resort to expensive and time-consuming means of collecting dues, particularly where, as

here, the employees work at widely varying hours. In the present case, the Company told the employees that it rejected union security and checkoff because "we feel that people do not have to join the Union to work at Saunders House" and, "we do not feel that it is Saunders' House's responsibility to take dues out of any employee's pay and send it to the Union." However the Company does not have any general policy against making deductions from employee paychecks. Where, as here, an employer adamantly opposes union security and checkoff on such vague or generalized "philosophical" grounds, or questionable assertions of policy, the inference is warranted that the employer entered negotiations with a fixed intention not to consider or agree to any form of union security or checkoff. See, Hospitality Motor Inn, Inc., 249 NLRB

1036, 1040 (1980), enf'd 108 LRRM 2945, F.2d (C.A. 6, 1982); Sweeney & Company, Inc. v. N.L.R.B., 437 F.2d 1127, 1134-1135 (C.A. 5, 1971). Such inference is further warranted where, as here, the employer, at a crucial stage in negotiations, advances demonstrably false reasons for its position. As indicated, attorney Abbott told the Board of Inquiry that the Company opposed union security and check-off because many employees had not wanted to join the Union at the time of the election, and because it did not know the desires of employees who replaced the 29 voters who no longer worked at the Company. However, when the Union proposed modified union security, which would exclude these categories of employees from the requirement of union membership (unless they had voluntarily joined the Union), the Company falsely

asserted that the Union had not changed its position. Moreover, the explanation which Abbott gave to the Board of Inquiry was irrelevant to the matter of checkoff, because in the absence of a union security clause, checkoff would be voluntary on the part of the employee. I find that the Company entered into and participated in negotiations with a fixed intention not to consider or agree to any form of union security or checkoff. Therefore, for this additional reason, there was no impasse as to these matters. I further find that the Company demonstrated its lack of good faith by its refusal to acknowledge other changes in position contained in the Union's April 15 proposals, by its false representation that it would consider those proposals, and by its failure to bargain over wages as described above.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full and regular part time service, maintenance and technical employees including dietary, housekeeping, maintenance and nursing including nursing aides, licensed practical nurses and licensed graduate practical nurses employed by the Company at its Lancaster Avenue and City Line Avenue, Philadelphia, Pennsylvania facility; excluding all other employees including professionals, managers, chefs, registered nurses, office clerical, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining

within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been and is the certified exclusive collective-bargaining representative of the employees in the unit described below.

5. By refusing to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, by unilaterally granting wage increases in April, 1981, at which time no impasse in bargaining existed, the Company has engaged, and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Company has been and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and

is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has been, and is, violating Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist from such violations, and to post appropriate notices. I further find that as part of an appropriate remedy, the Company should be ordered to bargain, upon request, with the Union as the exclusive representative of the unit employees. See, Winn-Dixie Stores, Inc., supra, 243 NLRB 972, 975; Alsey Refractories Company, 215 NLRB 785,

788 (1974). I agree with General Counsel's argument (Br. 15), that the Company's unlawful conduct constituted conduct which would tend to undermine the Union's representative status and to taint the subsequent negotiations. Therefore a resumption of bargaining is warranted as part of a complete remedy. By its unlawful conduct, the Company, to a signficant extent deprived the employees of the benefit of representation by a certified union, and deprived the Union of the benefit of such certification. The unfair labor practices which are alleged in the present complaint occurred slightly over 7 months after the Union's certification. Therefore, as requested by General Counsel, I am recommending that upon resumption of bargaining and for 5 months thereafter, the Union be regarded as if the initial year of certification had not

yet expired. See, Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enf'd., 350 F.2d 57 (C.A. 9, 1965).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 10/

ORDER

Respondent, Saunders House a/k/a the Old Man's Home of Philadelphia, its officers, agents, successors, and assigns, shall:

10/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Making unilateral wage increases, in derogation of its bargaining obligation, to its employees represented by District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO, in the appropriate bargaining unit described above; provided, however, that nothing herein shall require Respondent to vary such minimum salary schedules as are already established.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Regard the Union upon resumption of bargaining and for 5 months thereafter as if the initial year following certification had not expired.

(c) Post at its Philadelphia, Pennsylvania facility, copies of the attached notice marked "Appendix." 11/

11/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. July 30, 1982

Marvin Roth
Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAUNDERS HOUSE a/k/a THE OLD MAN'S HOME OF PHILADELPHIA, Petitioner	)	
v.	)	No. 82-3594
NATIONAL LABOR RELATIONS BOARD, Respondent	)	

JUDGMENT

Before: SEITZ, Chief Judge, GIBBONS and ROSENN, Circuit Judges

THIS CAUSE came on to be heard upon a petition filed by Saunders House a/k/a The Old Man's Home of Philadelphia, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on December 16, 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on

September 13, 1983, and has considered the briefs and transcript of the record filed in this cause. On October 26, 1983, the Court, being fully advised in the premises, handed down its opinion granting the petition for review and denying the Board's cross-application for enforcement. In conformity therewith, it is hereby

ORDERED AND DECREED by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board directed against Saunders House a/k/a The Old Man's Home of Philadelphia, its officers, agents, successors, and assigns, be and it hereby is denied.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

BY THE COURT

Max Rosenn
Circuit Judge

DATED: December 2, 1983

RECEIVED AND FILED

12-2-83

SALLY MRVOS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-3594

SAUNDERS HOUSE a/k/a
THE OLD MAN'S HOME OF PHILADELPHIA,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

4-CA-12047

Argued September 13, 1983

Before SEITZ, *Chief Judge*,
GIBBONS and ROSENN, *Circuit Judges*

Opinion Filed October 26, 1983

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National Labor Relations Board

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

Saunders House (employer) petitions for review of an order of the National Labor Relations Board (NLRB or Board) holding that Saunders House violated section 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1) and (5) (1976), by unilaterally increasing the wages of its employees. The employer argues that the wage increase did not constitute an unfair labor practice because at the time of the raise it had reached an impasse in its negotiations with District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO (union). The Board concluded that an impasse did not exist and cross-petitions for enforcement of its order. We grant the petition for review and deny enforcement.

I.

Saunders House is a non-profit Pennsylvania corporation that provides long-term health care at its Philadelphia facility. On August 28, 1980, following an election, the Board certified the union as the collective

bargaining representative of the Saunders House employees. The union's president, Henry Nicholas, requested a meeting with the employer to discuss the terms of a collective bargaining agreement, and sent the union's initial proposal to Frank Abbott, the employer's attorney and chief negotiator. The union proposed a $40 per week wage increase, plus a cost-of-living adjustment (COLA), as well as a full union security provision and a checkoff for union dues and initiation fees.

The parties met for the first time on September 16, 1980. Abbott represented the employer and Nicholas negotiated for the union. Abbott promised the union that the employer would submit a counter-proposal at the next bargaining session. He also inquired whether the union continued to object to a retroactive 8% wage increase. Nicholas responded that the union opposed the raise unless it was part of an overall contract package.[1]

On September 19, 1980, the parties met for the second time and the employer presented a proposed contract that did not provide for either a union security clause or a checkoff provision. Wage proposals were not included, but Abbott explained that they would be forthcoming. At the next meeting on September 24, the employer asked to defer discussion of economic matters.

The parties held meetings on October 8, October 29, November 5, and November 12, at which the subject of wages was not discussed. In the course of these meetings, Donna Ford, executive vice-president of the union,

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1. Although the union had indicated its opposition to the employer's suggestion of an immediate, interim 8% retroactive wage increase, the employer granted the wage increase to the unit employees on September 26. The union filed an unfair labor practice charge with the Board over the increase. The matter was settled by informal agreement and is not at issue here.

replaced Nicholas as the union's negotiator and the Federal Mediation and Conciliation Service appointed Christine Sickles to aid in the negotiations.

On November 24, 1980, Sickles asked Abbott and Ford what could be done to further the negotiations. Ford said that the employer had to "do something" on wages, union security, and checkoff. Abbott promised to deliver a wage proposal at the next session, and replied that "the answer is still no" to union security and checkoff. Ford told Abbott that she could not proceed further until the employer moved on the three issues.

On December 2, 1980, Abbott presented the employer's wage proposal, which was a one-year contract effective the date of ratification with a COLA on July 1, 1981. The union proposed a modified wage increase of $20 per week retroactive to September 1980, an $18 weekly increase effective September 1981, an $18 weekly increase effective September 1982, plus a COLA in the second year of the contract.

The parties conducted further negotiations December 8, December 22, and January 26. At these meetings, both parties' positions on economic issues remained unchanged. On February 6, 1981, during the twelfth session, Ford and Abbott agreed to meet privately.

The private meeting took place in Abbott's office on February 20, 1981. This off-the-record meeting lasted about thirty minutes during which the parties reviewed their respective positions. Ford told Abbott that a contract between the parties could be reached if the employer would agree to a dues checkoff, a modified union security clause, and wage increases of 8% in each year of a three-year contract. Abbott replied that this would probably be unacceptable to his client, and that he would present a counter-proposal at the next meeting.

On March 2, 1981, Abbott presented a proposal for a contract to expire on September 30, 1981. It included in-

dividual pay raises that would amount to an average of about 6-1/2%. In addition, the employer offered an across-the-board 6% wage increase effective July 1 in lieu of a COLA. There were no union security or checkoff provisions. Furthermore, Abbott stated that the contract proposal was the employer's "final offer." Ford said that the union would study the proposal, but that it would not accept a contract that failed to provide for increases for all employees.

The parties next met on March 5. Ford presented the union's "final offer" on wages: increases of 8% retroactive to July 16, 1980, 10% effective on July 1, 1981, and 10% effective on July 1, 1982. There was no mention of a COLA. Abbott reiterated that the union already had the employer's final offer.

On March 16, 1981, the Federal Mediation and Conciliation Service set up a fact-finding board. Nicholas represented the union at the board hearing and proposed 8%, 10% and 10% increases *plus* a COLA. The union asked for a determination of seven issues: union security, checkoff, union activity, grievance procedures, wages, contract duration, and reinstatement of two previously dismissed employees. Abbott restated the employer's position as of March 2, 1981.

The fact-finding board issued its non-binding recommendations on March 20, 1981. It called for a contract termination date of August 3, 1982, modified union security, a checkoff provision, and an across-the-board 8% wage increase effective September 1, 1981.

The next negotiating session took place on March 30. Ford told Abbott that the union would accept the modified union security provision and would drop its demand for reinstatement of the two previously fired employees. Abbott repeated that the union had the employer's final proposal.

On April 15, 1981, the parties met again. Nicholas, representing the union, submitted a written proposal.

With respect to union activity, checkoff, and duration of the contract, there was no change from the position presented to the fact-finder. Nicholas included the modified union security provision that Ford had offered at the last meeting. On wages, the union asked for 8% increases in each year. There was no demand for a COLA. Abbott asked for and received some clarifications. He then said that he would discuss the proposal with his client.

The next day, April 16, Abbott wrote Nicholas a letter that stated that the union's proposal presented no changes in its position. He again repeated the employer's final offer and informed the union that unless it accepted the employer's proposal by April 22, the employer would implement its proposed wage increase. On April 20, Nicholas responded that the union had changed its position with respect to wages, union security, and other items and therefore objected to any unilateral wage increase, asserting that such an increase would constitute an unfair labor practice.

Abbott tried unsuccessfully to contact Nicholas by telephone on April 21 and April 22. On April 22, 1981, Abbott sent Nicholas a letter stating that because the parties remained at an impasse on the key issues, the employer would implement its wage proposal. On April 22, the employer granted wage increases averaging approximately 6-1/2% to its employees. The union filed an unfair labor practice charge.

On October 24, 1981, the regional director of the Board issued a complaint alleging a violation of section 8(a)(1) and (5) of the National Labor Relations Act.[2] After

2. Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the bargaining agent of its employees. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce its employees in the exercise of their rights guaranteed under the Act.

an evidentiary hearing, the administrative law judge (ALJ) found that the employer had violated section 8(a)(1) and (5) of the Act. The employer excepted to the findings, including one that it had not acted in "good faith." The Board agreed with the employer's exception to the finding that it had not acted in "good faith," but still affirmed the ALJ's conclusions.

II.

An employer violates section 8(a)(1) and (5) of the Act if it unilaterally changes a condition of employment that is the subject of negotiation. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In *Huck Manufacturing Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982), the Fifth Circuit observed, "The principal exception to this rule occurs when the negotiations reach an impasse: when impasse occurs, the employer is free to implement changes in employment terms unilaterally so long as the changes have been previously offered to the Union during bargaining." The parties in the present case agree that the employer unilaterally changed a condition of employment that was a mandatory subject of bargaining. Thus, the issue in dispute is whether there was an impasse.

The Board has defined impasse as a situation in which one party is "warranted in assuming . . . that the [other party] had abandoned any desire for continued negotiations, or that further good-faith bargaining . . . would have been futile." *Alsey Refractories Company*, 215 N.L.R.B. 785, 787 (1974). This court has recognized that the term impasse may be used to describe that point in labor negotiations in which there is sufficient disagreement over a mandatory subject of bargaining to permit unilateral action on the subject by one of the parties. *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (3d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981).

Under Board policy, five general factors are considered in determining whether negotiations have reached

an impasse. These include: "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disgareement, [and] the contemporaneous understanding of the parties as to the state of negotiations . . . ." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *enforced sub nom. AFTRA, Kansas City Local v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Both sides argue at length over whether each of these factors supports their position. The Board resolved the issue of good faith bargaining in favor of the employer. Crucial to the decision in this case, however, is neither good faith, nor the bargaining history, nor length of the negotiations, but rather the importance of the issues over which there remained disagreement and the extent of movement of the parties toward a negotiated settlement.

The employer argues that a deadlock on one critical issue can create an impasse. *NLRB v. Yama Woodcraft, Inc.*, 580 F.2d 942, 945 (9th Cir. 1978). "Where good faith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock, the Board is warranted, . . . and perhaps sometimes even required, . . . to make a determination that an impasse existed." *Id.* at 944 (quoting *Dallas General Drivers, W. & H., Local No. 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966)). Wages were obviously a major issue in the negotiations of this first labor contract between the parties. In *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978), the court stated: "Those who bargain collectively are normally under an obligation to continue negotiating to impasse on all mandatory issues. The law relieves them of that duty, however, when a single issue looms so large that a stalemate as to it may fairly be said to cripple the prospects of any agreement." *Id.* at 881 (citation omitted). The Third Circuit has held that the term impasse may

"be used to refer to a breakdown in all negotiations over either one or several issues." *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (3d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981).

III.

The Board held that an impasse did not exist in this case because the union's April 15th proposal demonstrated movement in its position. The Board notes that movement on one important issue may support a finding that an impasse did not exist even though other key issues remain unresolved. Labor negotiations experience has demonstrated that a willingness to move toward an agreement on an important issue in dispute might trigger other concessions on related questions. *See NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966). As the court stated in *Huck Manufacturing Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982), "for a deadlock to occur, *neither party* must be willing to compromise." *Id.* at 1186.

Saunders House contended before the Board, as it does in this court, that the union's April 15th wage proposal was not new and was not a concession. The Board responded to the employer's contention:

> The Respondent contends that this is not a concession on the Union's part because it had been aware that such a proposal was acceptable after the February 20 meeting. We disagree. The Union's wage offer of April 15 offered now "on the record" and in conjunction with other proposals was a new offer on the Union's part and one showing a significant concession.

Saunders House, 265 N.L.R.B. No. 207, slip op. at 9, n.6 (Dec. 16, 1982).

The Board stresses that determining whether there is a genuine impasse is a "question of fact to which no

mechanical definition can be applied." *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1173 (8th Cir. 1972). As such, it often depends on the mental state of the parties and is therefore "particularly amenable to the expertise of the Board as fact-finder." *Huck Manufacturing Co.*, 693 F.2d at 1186. In discussing the difficult question of determining when further bargaining on an issue is futile, the court in *Dallas General Drivers, W & H, Local No. 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966), aptly observed that in the complex realm of industrial relations "few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems." *Id.* at 844-45 (but noting that "[w]here good faith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock, the Board is warranted, and perhaps sometimes even required, to make a determination that an impasse existed").

The court must uphold the Board's conclusion that there was no impasse and that the employer committed an unfair labor practice if the Board's findings are supported by substantial evidence on the record as a whole. *Universal Camera Co. v. NLRB*, 340 U.S. 474, 488 (1951). On the other hand, this court will not enforce the Board's ruling unless there is substantial evidence in the record to support its finding that there was no impasse. There were three key issues in dispute between the employer and the union from the very inception of their negotiations in September 1980: wages, union security, and checkoff. These issues were uppermost in the minds of the parties throughout the negotiations. The union adamantly insisted upon a checkoff provision, and the employer steadfastly opposed its inclusion. On union security, the union altered its position from a demand for full union security to a modified union security proposal. The union informed the em-

ployer of this change at the off-the-record meeting on February 20 and then presented it formally on March 30. The employer continued to refuse to include any union security provision. The modification by the union and the employer's rejection of the attempted compromise occurred before the April 15th final session and the employer's subsequent wage increase.

Although it is clear that the parties were at impasse on the union security and checkoff provisions, the question of whether wages were deadlocked is more difficult to resolve. On February 20, union representative Ford told employer representative Abbott in the off-the-record session that the union would be willing to accept a three-year contract with provisions for 8% wage increases each year. This offer was rejected by the employer on March 2 when it proposed an alternative plan for a contract of less than one year with wage increases varying by employee but averaging about 6-1/2%. In the negotiations that followed, the union progressively lowered its on-the-record demands. On April 15 the union president produced a written proposal for a three-year contract with provisions for 8% wage increases in each year. This wage offer was identical to the one provided off the record on February 20, but it constituted significant movement from its prior announced position.

A concession by one party on a significant issue in dispute precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement. The new proposal must be one that should encourage the parties to believe that further negotiations would not be futile. If, however, it does not bring the parties any closer than they were previously (albeit because of an off-the-record conversation), it is difficult to perceive how the on-the-record position provides an incentive to continue bargaining in the belief that a settlement is nearer.

IV.

We conclude that a mere shift from a position off the record to one on the record is not a concession sufficient to preclude a finding of impasse. The union did not propose anything on April 15 that it had not presented to the employer at an earlier date; there was in fact no real movement and the employer so notified the union by letter the next day. Furthermore, the employer put the union on notice in that letter that unless the Saunders House final offer was accepted by April 22, it would put the proposed wage increase into effect. This increase was not greater than the one offered by the employer at the bargaining table. The union, however, continued to adhere to its position.

There is not substantial evidence in the record to support the Board's conclusion that the parties were not at impasse and that the employer's unilateral wage increase constituted an unfair labor practice. The petition of Saunders House will be granted and the Board's cross-petition for enforcement will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4394)

CERTIFICATE OF SERVICE

I, MIRIAM L. GAFNI, hereby certify that on March 1, 1984, I deposited in the United States Mail, first class mail, postage prepaid, three copies each of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and served:

Jacob Hart, Esquire
Schnader, Harrison, Segal & Lewis
1600 Market Street
Philadelphia, PA 19103
Counsel for Respondent

and

Elliott Moore, Esquire
Susan L. Dolin, Esquire
Office of the General Counsel
National Labor Relations Board
Washington, DC 20570

and

Peter Hirsch, Regional Director
Region 4
National Labor Relations Board
615 Chestnut Street
Philadelphia, PA 19106

Miriam L. Gafni
MIRIAM L. GAFNI

DATE: 3/1/84

No. 83-1449

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

DISTRICT 1199C, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, DIVISION OF RWDSU, AFL-CIO,
Petitioner,

v.

SAUNDERS HOUSE, a/k/a THE OLD MAN'S HOME OF PHILADELPHIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT SAUNDERS HOUSE, a/k/a THE OLD MAN'S HOME OF PHILADELPHIA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Jacob P. Hart
Robert F. Harchut
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Of Counsel.

* Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Is a court of appeals required to enforce an order of the National Labor Relations Board when there is not substantial evidence in the record to support the Board's conclusion that no impasse in collective bargaining existed to justify an employer's unilateral wage increase?

2. Is there any reason why the Supreme Court of the United States should create a new exclusionary rule forbidding consideration of relevant, credible, and material evidence in deciding whether an impasse existed in negotiations for a collective-bargaining agreement?

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National Labor Relations Act

STATEMENT

By its Petition for Writ of Certiorari, District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO (the "Union"), seeks to have this Court review and reverse a unanimous decision of the United States Court of Appeals for the Third Circuit which refused to enforce an Order of the National Labor Relations Board ("NLRB" or the "Board"), issued against Saunders House, a/k/a The Old Man's Home of Philadelphia ("Saunders House"), for an alleged violation of Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act"). Petitioner neither filed a brief nor even participated in oral argument in the court of appeals (the "court"). Saunders House's real opponent in the court of

appeals, the NLRB, was apparently satisfied with the decision of that court, having chosen not to seek either rehearing en banc or review by this Court.

From September 16, 1980 until April 15, 1981, the Union and Saunders House engaged in negotiations for a collective bargaining agreement. (180a).[1] On April 15, 1981, after what the Union president described as "the longest negotiations in the Union's history," (64a, 100a), an impasse in negotiations had admittedly been reached. (143a, 399a). Recognizing that an employer has the right to institute unilateral changes in terms and conditions of employment after it has bargained in good faith to impasse

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1. "a" references are to the Appendix in the United States Court of Appeals for the Third Circuit.

(so long as the changes are reasonably comprehended within its pre-impasse proposals), Saunders House implemented its pre-impasse wage proposal on April 22, 1981. (Pet. App. 12A).[2] Because Saunders House's good-faith bargaining was undisputed (Pet. App. 15A), the ultimate issue for decision in this case was simply whether the impasse still existed at the conclusion of the parties' final bargaining session on April 15, thereby justifying Saunders House's wage increase one week later on April 22.

Throughout the entire course of the proceedings below, the NLRB asserted that "movement" or "modifications" occurred in the Union's position on April 15, 1981, sufficient to break the admitted impasse. For example, in his opening statement at

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2. "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

the hearing before the Administrative Law Judge, counsel for the General Counsel stated:

> "[I]t is our contention that even if an impasse existed prior to April 15th, the impasse was clearly broken by the modifications that the Union made in the proposal of April 15th. . . . [T]hat is our theory of the case." (29a).

Moreover, the Board in its Decision persistently alluded to the supposed "movement" and "real concessions" on the Union's part that purportedly occurred on April 15. (Pet. App. 17A-19A). The gist of the Board's theory was that these "real concessions" were embodied in the Union's transformation of its February 20, 1981 "off-the-record" wage proposal into an identical "on-the-record" offer on April 15, 1981. (Pet. App. 17A-18A).

Applying the appropriate standard of review and giving deference to the expertise of the NLRB, the United States Court of Appeals for the Third Circuit still decided that there was "not substantial evidence in the record to support the Board's conclusion that the parties were not at impasse and that the employer's unilateral wage increase constituted an unfair labor practice." (Pet. App. 119A). The court stated:

> "[A] mere shift from a position off the record to one on the record is not a concession sufficient to preclude a finding of impasse. The union did not propose anything on April 15 that it had not presented to the employer at an earlier date; there was in fact no real movement and the employer so notified the union by letter the next day." (Pet. App. 119A).

Such a conclusion was clearly in compliance with the standard consistently

applied by the Board and the courts in determining whether an impasse exists -- i.e., that there be "no realistic possibility that continuation of discussion at that time would have been fruitful." NLRB v. Beck Engraving Co., 522 F.2d 475, 484 n.16 (3d Cir. 1975), quoting American Federation of Television & Radio Artists v. NLRB, 395 F.2d 622, 698 (D.C. Cir. 1968) (emphasis added).[3]

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3. See also Excavation-Construction, Inc. v. NLRB, 660 F.2d 1015, 1020 (4th Cir. 1981); H & D, Inc. v. NLRB, 665 F.2d 257, 259 (9th Cir. 1980), vacated on other grounds, 455 U.S. 902 (1982); NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 147 (2d Cir. 1978), cert. denied sub nom. Shopmen's Local Union No. 455 v. NLRB, 439 U.S. 1130 (1979); Patrick & Co., 248 N.L.R.B. 390, 393 (1980); Providence Medical Center, 243 N.L.R.B. 714, 731 (1979). The Supreme Court disagreed with Beck, H & D, Inc., and Steel Fabricators

(Footnote continued on next page)

ARGUMENT

The Union has asked this Court to grant certiorari to decide two questions which it argues merit review. Even if the court of appeals had committed the errors with which it is charged, however, these are not questions which need or are entitled to this Court's attention since there are no "special and important reasons" for certiorari to be granted. Sup. Ct. R. 17. Furthermore, it is respondent's position that the court of appeals did not make any errors, and that there was ample basis for that court's decision.

(Footnote continued from previous page)

on other grounds in Charles D. Bonnano Linen Serv., Inc. v. NLRB, 454 U.S. 404 (1982) (holding that an impasse is not such an "unusual circumstance" as to justify unilateral withdrawal from a multiemployer bargaining unit).

I.

DISTRICT 1199C'S PETITION RAISES NO QUESTIONS WHICH DESERVE CONSIDERATION BY THIS COURT.

Although the succeeding sections of this brief answer each of petitioner's questions on the merits, we begin by noting that neither of those questions deserves consideration by this Court under the standards of Supreme Court Rule 17.

The principal question raised by the Union in its Petition for Writ of Certiorari is whether there was substantial evidence on the record as a whole to support the NLRB's finding of no impasse. This is the very same question that was raised in the court of appeals and that was thoroughly considered by that court. The Congress and this Court have already established the standards for appellate court review of NLRB findings of this

type, and the court applied those standards in a manner fully consistent with this Court's guidelines and in harmony with the decisions of the other courts of appeals which have faced the same issue. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).[4] Here, the Union is simply asking that the same standards be applied all over again, and there is no reason for this Court to do so. As the Universal Camera Court stated: "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." (Id.).

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4. See also cases cited at note 3 supra.

Almost as an afterthought,[5] petitioner also argues that this Court must review and reverse the decision of the court of appeals because, otherwise, the judicial system will be engulfed by cases in which employers attempt to use "off-the-record" union proposals to justify a finding of impasse on the ground that, when the Union later made the same proposal "on the record," the employer already knew what the Union would accept.

The first and most obvious answer to this argument is that it is perfectly permissible to consider "off-the-record discussions" in finding impasse if those discussions, as here, show that there is no realistic possibility of reaching

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5. In the 20-page Argument section of its brief, the Union devoted a mere 3 pages to this theory.

agreement. Second, should there be other employers in the future who raise this issue, they would also be entitled to prevail if the facts are the same as these. Quite frankly, however, it is difficult to conceive of any flood of such cases engulfing the courts. In fact, in the entire history of collective bargaining in this country, the instant case apparently represents the first time that this specific issue has been presented in a court of appeals. The absence of prior appellate court rulings on this issue is understandable since the question is completely fact dependent -- i.e., off-the-record proposals will only be considered after a factual finding that such proposals were actually made (as the Administrative Law Judge found in this case). Obviously, fact-dependent matters such as this do not

merit this Court's attention, especially one which occurs so infrequently.

Third, the court of appeals' consideration of the off-the-record proposal as evidence of impasse was completely consistent with the standard generally applied by the Board and the courts in determining whether an impasse exists -- that there be "no realistic possibility that continuation of discussion at that time would have been fruitful."[6] Finally, consideration of the off-the-record proposal presented no conflict with any existing Board law since informal private discussions between union and management negotiators have been found to be relevant considerations in determining whether impasse has been reached. See Providence

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6. See cases cited at note 3 supra.

Medical Center, 243 N.L.R.B. 714, 730-31 (1979).

In short, even assuming arguendo that the Union is correct in its view of the opinion below, it has failed to show any "special and important reasons" why this Court should review this case.

II.

THE COURT OF APPEALS CORRECTLY DECIDED THAT THERE WAS NOT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE NLRB'S CONCLUSION THAT NO IMPASSE IN COLLECTIVE BARGAINING EXISTED TO JUSTIFY SAUNDERS HOUSE'S UNILATERAL WAGE INCREASE.

Since good-faith negotiations were at impasse when Saunders House implemented its pre-impasse wage proposal on April 22, 1981, its conduct was lawful. The NLRB's technical finding that no impasse existed on that date because some sort of Union "movement" had occurred on

April 15 is totally unsupported in the record, is contradicted by the Board's own findings, and is inconsistent with prior Board and court case law. Further, there was overwhelming evidence that on April 15 & 22, 1981, no such "movement" had occurred and impasse clearly existed on a number of unresolved, mandatory subjects of bargaining. Therefore, the court of appeals properly denied enforcement of the Board's Order.

A. The Court of Appeals Correctly Applied the Appropriate Standard of Review.

The thrust of the Union's argument in its Petition is that the court of appeals erred in failing to find substantial evidence in the record to support the Board's finding that impasse did not exist on April 22, 1981. The Union contends

that, because the Board's finding of no impasse was a "purely factual determination" peculiarly suited to NLRB expertise, the court must have substituted its own findings of fact in order to conclude that an impasse existed. The Union argues that, although the court of appeals acknowledged the narrow standard of review applicable to this case -- i.e., the substantial evidence test -- it ignored that standard and violated public policy by disagreeing with the NLRB.

The Union's unwillingness to accept the opinion below rests on its failure to understand that much more than a "purely factual determination" was involved in this case. As Chief Justice Burger recently observed, "unions and employers have important rights which arise upon impasse." Charles D. Bonnano Linen

Service, Inc. v. NLRB, 454 U.S. 404, 426 (1982) (Burger, C.J., dissenting). One of those important rights is the privilege of instituting unilateral changes in terms and conditions of employment after a good-faith bargaining impasse has been reached.

Saunders House demonstrated in the court of appeals that the NLRB proferred a patently irrational argument in attempting to support its finding that "movement" occurred on April 15 sufficient to break the admitted impasse. Saunders House further demonstrated that, far from providing "substantial evidence" for its finding, the Board set forth no evidence whatsoever for its conclusion, repeatedly misrepresented the record, and ignored or misstated prior Board and court case law. It was under these

circumstances, when Saunders House was unfairly about to be denied an important right, that the court performed its duty and refused to enforce the Board's Order. The court did not make any determinations regarding underlying facts different from those of the Board; it merely reasoned that, accepting those facts exactly as the NLRB had found them, there was not substantial evidence to justify the Board's ultimate conclusion of no impasse.

It is well settled that an NLRB finding of no impasse may not be enforced unless it is supported by substantial evidence on the record considered as a whole. See Excavation-Construction, Inc. v. NLRB, 660 F.2d 1015, 1019 (4th Cir. 1981); see also Universal Camera Corp. v. NLRB, supra, 340 U.S. at 488. That standard does not reduce appellate judges to

the status of "automata." Id. at 489. Before a court of appeals can reach a final decision on whether an NLRB order may be enforced, it must carefully assess "whatever in the record fairly detracts from" the Board's decision. Id. at 488. Courts of appeals have not hesitated to reverse NLRB findings of no impasse when the "record amply supports the conclusion that the parties were at loggerheads." NLRB v. Beck Engraving Co., supra, 522 F.2d at 484.'

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7. See also Excavation-Construction, Inc. v. NLRB, supra, 660 F.2d at 1019-20, 1023 n.4 (rejecting NLRB's conclusion that there was no impasse); H & D, Inc. v. NLRB, 665 F.2d 257, 259-60 (9th Cir. 1980), vacated on other grounds, 455 U.S. 902 (1982) (same); NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 146-48 (2d Cir. 1978), cert. denied sub nom. Shopmen's Local Union No. 455 v. NLRB, 439 U.S. 1130 (1979) (same).

In the court of appeals, Saunders House demonstrated by a careful, point-by-point analysis of the Union's April 15th proposal that no movement in the Union's position occurred on April 15, and that the parties were still at loggerheads on April 22, 1981. In its brief to the court of appeals, Saunders House presented the following chart to illustrate graphically that every proposal that the Union made on April 15 as to an open issue was identical to a position that the Union had previously announced.

THE UNION MADE NO MOVEMENT WHATSOEVER IN ITS APRIL 15, 1981, OFFER

ITEM	UNION'S POSITION IN OFFER OF APRIL 15, 1981	UNION'S POSITION PRIOR TO OFFER OF APRIL 15th	DATE AND MANNER OF UNION'S COMMUNICATION OF ITS POSITION PRIOR TO APRIL 15th	RECORD REFERENCE
WAGES	8%-8%-8%	8%-8%-8%	February 20, 1981, meeting between Abbott and Ford	NLRB Decision A. 448a; see also A. 134a, 153-53a 414-15a
(COST OF LIVING CLAUSE)	COLA Clause Dropped	COLA Clause Dropped	March 5, 1981, Negotiating Session	NLRB Decision A. 449a; see also A. 89-89a, 113a, 141a, 155a
UNION SECURITY	Modified Union Shop	Modified Union Shop	February 20th meeting between Abbott & Ford; March 30, 1981, Negotiating Session	NLRB Decision A. 449-50a; see also A. 114-15a, 134a, 414-15a, 418a
GRIEVANCE PROCEDURE	Guaranteed Hearing at Each Step	Guaranteed Hearing at Each Step	Presented as Part of Union's Proposal to Fact-Finder on March 14, 1981	Joint Ex. 10 (A. 392a); see also A. 65a
UNION ACTIVITY	As Stated in Union's Original Contract Proposal	As Stated in Union's Original Contract Proposal	Part of Union's Proposed Contract Submitted at September 9, 1980, Negotiating Session	Joint Ex. 5(b) (A. 211-14a); see also A. 65a
DUES CHECKOFF	As Stated in Union's Original Contract Proposal	As Stated in Union's Original Contract Proposal	Part of Union's Proposed Contract Submitted at September 9, 1980, Negotiating Session	Joint Ex. 5(b) (A. 194-96a); see also A. 64a
SICK LEAVE	Beginning on First Day of Illness	Beginning on First Day of Illness	Part of Union's Proposed Contract Submitted at September 9, 1980, Negotiating Session	Joint Ex. 5(b) (A. 197-98a); see also A. 65-66a
REINSTATEMENT OF DISCHARGED EM-	Discharged Employees Need Not Be Rehired	Discharged Employees Need Not Be Rehired	March 30, 1981, Negotiating Session	A. 116a

In light of this evidence in the record which "fairly detracted" from the Board's decision, the court correctly applied the substantial evidence test and concluded that an impasse had occurred.

The Union obviously would have preferred for the court to have simply deferred to the Board's presumed expertise and to have rubber stamped its finding of no impasse. As Chief Justice Burger recently stated, however, both "the Board and the courts have acquired considerable experience in determining whether an impasse exists." Charles D. Bonnano, supra, 454 U.S. at 426 (Burger, C.J., dissenting) (emphasis added). Similarly, the court has also recognized that "an agency is not the exclusive repository of technical expertise." Hi-Craft Clothing Co. v.

NLRB, 660 F.2d 910, 915 (3d Cir. 1981).

As the Hi-Craft court observed:

> "Blind acceptance of agency 'expertise' is not consistent with responsible review.
>
> "When the agency diet is food for the court on a regular basis, there is little reason for judges to subordinate their own competence to administrative 'expertness.'" Id.

Under the circumstances of this case where much more than a "purely factual determination" was involved, the court properly refused to subordinate its own competency to NLRB "expertness" and correctly applied the substantial evidence test in concluding that the conduct of Saunders House was legal.[8]

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8. The Union's reliance on the majority opinion in Charles D. Bonnano is misplaced since a totally different

(Footnote continued on next page)

B. There is No Reason for This Court to Create a New Exclusionary Rule Forbidding Consideration of Relevant, Credible, and Material Evidence in Deciding Whether an Impasse Exists in Negotiations for a Collective-Bargaining Agreement.

As noted above, the NLRB theorized that "movement" and "real concessions"

(Footnote continued from previous page)

standard of review applied in that case. The issue before the Bonnano Court was whether an admitted bargaining impasse is such an unusual circumstance as to justify an employer's withdrawal from a multiemployer bargaining unit. 454 U.S. at 407, 412. In deciding this issue, the Court applied the "arbitrary/contrary to law" standard of review in determining that the Board had properly exercised its judgment in balancing conflicting union and employer interests. Id. at 413. In the present case, on the other hand, the reviewing court appropriately applied the "substantial evidence" test in deciding that there was not substantial evidence in the record to support the Board's finding of no impasse.

occurred on April 15, 1981, when the Union transformed its February 20, 1981 "off-the-record" wage proposal into an identical "on-the-record" offer. (Pet. App. 17A-18A). Saunders House demonstrated to the court that the Union's purported movement on wages -- i.e., converting its specific (not "intimated") February 20th proposal into an on-the-record offer -- was clearly not a "real" concession or any concession at all. To have required Saunders House to disregard what it already knew to be the Union's bottom line, and pretend that the Union had "moved" on wages, would have been to ignore the courts' and the Board's very definition of impasse -- "no realistic possibility" that continuing discussion would be fruitful.[9]

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9. See cases cited at note 3 supra.

The court agreed that the Union made no movement, concluding that "a mere shift from a position off the record to one on the record is not a concession sufficient to preclude a finding of impasse." (Pet. App. 119A). Viewing the matter realistically, the court observed that "[t]he Union did not propose anything on April 15 that it had not presented to the employer at an earlier date; there was in fact no real movement and the employer so notified the Union by letter the next day." (Id.). Additionally, the court noted:

> "The employer put the Union on notice in that letter that unless the Saunders House final offer was accepted by April 22, it would put the proposed wage increase into effect. This increase was not greater than the one offered by the employer at the bargaining table. The Union, however, continued to adhere to its position." (Id.).

Thus, the parties' conduct after April 15, 1981, reaffirmed the impasse which existed on that date. Requiring Saunders House to do anything more at that point would have been to force it "to agree to a proposal or require the making of a concession" -- something which the Act specifically says the employer is not compelled to do. 29 U.S.C. § 158(d). As this Court has stated:

> "[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based -- private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." H.K. Porter v. NLRB, 397 U.S. 99, 108 (1970).

Nevertheless, the Union in its petition argues that this Court must review

and reverse the decision of the court because otherwise,

> "every time an off-the-record conversation between negotiators is converted by one party to a formal offer presaging a stance of impasse once the offer is finally placed "on-the-record" to justify unilateral implementation of the last offer, the ensuing unfair practice charges found meritorious by the NLRB will clog the courts with petitions for review in hopes of a more favorable, albeit less expert analysis of the bargaining dynamics." (Petition for Writ of Certiorari at 35-36).

In essence, the Union is requesting that this Court create a new exclusionary rule forbidding consideration of relevant, credible, and material evidence in deciding whether impasse exists in negotiations for a collective bargaining agreement. Saunders House submits that this Court should refuse to institute such a

drastic change in the law for the following reasons.

First, the courts have historically taken a restrictive view of exclusionary rules of evidence, adopting such limitations only when there exist compelling reasons to do so. See Trammel v. United States, 445 U.S. 40, 50-51 (1980).[10] As this Court stated in Trammel:

> "Testimonial exclusionary rules and privileges . . . must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally

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10. See also United States v. Nixon, 418 U.S. 683, 710 (1974) ("exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth"); In Re Dinnan, 661 F.2d 426, 430 (5th Cir. 1981) (requiring "compelling justification" for adoption of new evidentiary privilege).

> predominant principle of utilizing all rational means for ascertaining truth.'" 445 U.S. at 50, quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

Here, the only reason advanced by the Union for the adoption of such a rule is its allegation that the judicial system will become engulfed with employers attempting to overcome NLRB unfair labor practice charges by asserting impasse based on off-the-record discussions. As explained above, such a scenario is extremely unlikely since evidence of off-the-record proposals will only be considered after an administrative law judge has found as fact that such proposals actually were made (as the ALJ found in this case). The unlikelihood that such fact-dependent issues will wind up in the appellate courts is demonstrated by the fact

that there appears to be no other appellate court decision regarding this issue, despite the long history of litigation over collective bargaining in this country.

Second, such a rule is directly contrary to the NLRB's own precedent since, under Board law, informal private discussions between Union and management negotiators are relevant considerations in determining whether an impasse has been reached. See Providence Medical Center, supra, 243 N.L.R.B. at 730-31. Moreover, adoption of such a rule would, for no reason, circumscribe the broad scope of inquiry traditionally employed by the Board in evaluating whether impasse has been reached. See Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), pet. for review denied sub nom. American Federation of

Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

Finally, to adopt the rule proposed by the Union would make a mockery of the standard consistently applied by the Board and the courts in determining whether an impasse exists -- that there be "no realistic possibility that continuation of discussion at that time would have been fruitful."[11] In actuality, the Union is asking for a rule that would require negotiators to view collective bargaining through the proverbial "Looking Glass" and to disregard the clear realities of the situation. Saunders House submits that there is no reason for this Court to create an exclusionary rule that

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11. See cases cited at note 3 supra.

would require reality to be ignored in the collective-bargaining process.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 2, 1984.

No. 83-1449

In the Supreme Court of the United States

OCTOBER TERM, 1983

DISTRICT 1199C, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, DIVISION OF RWDSU, AFL-CIO, PETITIONER

v.

SAUNDERS HOUSE a/k/a THE OLD MAN'S HOME OF PHILADELPHIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The court of appeals in this case denied enforcement of an order of the National Labor Relations Board on the ground that the Union and the Employer had reached impasse in bargaining.[1]

1. The Union and the Employer began negotiations for an initial contract following certification of the Union as bargaining representative of the Employer's employees on August 28, 1980. Prior to the initial bargaining session, the Union submitted a contract proposal that provided for an

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[1] As a party in the court of appeals, the Board is a respondent in this Court pursuant to Sup. Ct. R. 19.6.

across-the-board wage increase, a cost-of-living increase, union security, and dues checkoff. Pet. App. 4a-5a. The parties met a total of 17 times over a seven-month period beginning September 16, 1980. The Employer, however, did not make any proposals or engage in discussions concerning wages during any of the early negotiating sessions. Pet. App. 4a-7a.[2]

On November 24, 1980, the Union asked for the Employer's position on wages, union security, and dues checkoff; the Employer rejected the Union's proposals on union security and checkoff, and stated that it would present a wage proposal at the next session. On December 2, 1980, the Union made a new proposal for annual increases over three years; the Employer countered with an offer of a cost-of-living increase for one year but refused to engage in further discussion of wages at that session or at the following three meetings. Pet. App. 6a-7a.

The parties met again on February 6, 1981, and agreed to review their bargaining positions. At an "off the record" meeting on February 20, the union representative described as ultimately acceptable to the Union three successive annual increases of eight percent, modified union security, and dues checkoff. The Employer's negotiator agreed to present a formal wage proposal at the next session, and on March 2 the Employer proposed a complete revision of wages resulting in an average increase of six and one-half percent. This was the Employer's final offer. The Union made a counterproposal on March 5 for a series of increases ranging from eight to 10 percent with no cost-of-living

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[2]After the first bargaining session, the Employer declared negotiations over wages to be at impasse and unilaterally implemented an eight percent increase. The Union filed unfair labor practice charges, and the matter was resolved through an informal settlement agreement. Pet. App. 5a-6a & n.2.

increase. The Employer did not respond. Pet. App. 7a-9a. On March 16 the Federal Mediation and Conciliation Service appointed a board of inquiry to aid in negotiations. The parties rejected the board's nonbinding recommendations; however, the Union subsequently adopted a modified union shop proposal that the board had recommended. The Employer continued to insist on its March 2 offer. *Id.* at 9a-10a.

On April 15 the Union presented a series of proposals that included an eight percent wage increase in each of three years with no cost-of-living increase, as well as provisions for union security, dues checkoff, and grievance procedures. In addition, the Union added a proposal for sick leave and dropped a request for the reinstatement of two workers. The Employer's negotiator agreed to discuss the proposal with the Employer, but the next day the Employer notified the Union that it saw no change in the Union's position and that the parties were at impasse. On April 22 the Employer implemented its March 2 wage proposal over the Union's objections. Pet. App. 10a-12a.

2. Based on the above-stated facts, the Board found that no impasse existed at the time the Employer unilaterally instituted the change in wages and therefore that the change violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 12a).[3] In concluding that the parties had not reached impasse, the Board considered the relevant bargaining history, the good faith of the parties,

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[3]In so holding, the Board adopted the conclusion but not the analysis of the administrative law judge (ALJ) (Pet. App. 2a-4a, 12a-13a & n.4). The ALJ found that the Employer had negotiated in bad faith, and thus that no impasse could be found as a matter of law (*id.* at 78a-96a). The Board, concluding that the issue of the Employer's subjective good faith had not been litigated by the parties, held that the violation was based only on the ground that, in fact, impasse had not been reached (*id.* at 12a-13a & n.4).

the length of the negotiations, the importance of the issue as to which there was disagreement, and the contemporaneous understanding of the parties. The Board found that, although negotiations on all issues had been lengthy, the Employer did not make its first and only proposal on the central issue of wages until March 2, and that the Union's April 15 proposal represented movement on significant issues in dispute. Pet. App. 14a-17a. Rejecting the Employer's contention that it was already aware of the Union's proposal after the "off the record" meeting of February 20, the Board held that the April 15 wage offer, made for the first time in formal negotiations and coupled with other proposals, was a new offer by the Union (*id.* at 17a-18a & n.6). Under all the circumstances, "[t]he repetition of proposals made before is not sufficient to nullify the real concessions that the Union was offering" (*id.* at 18a).

3. The court of appeals denied enforcement of the Board's order, concluding that the parties had reached impasse. The court found that the Union's April 15 proposal, although a shift from the Union's earlier formal position, was no different from its February 20 off-the-record proposal that the Employer had rejected with its counteroffer of March 2. Pet. App. 119a. Accordingly, the court held that "there was in fact no real movement" (*ibid.*).[4]

4. The Union contends that the Board's finding of impasse was supported by substantial evidence and that the court of appeals therefore erred in reaching a contrary conclusion. However, the Union, while the charging party before the Board, did not intervene in the court of appeals.

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[4]The court of appeals subsequently denied the Employer's motion for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412. *Saunders House a/k/a The Old Man's Home of Philadelphia* v. *NLRB*, No. 82-3594 (3d Cir. Feb. 17, 1984).

Thus, it was not a party in the court of appeals and has no standing to file a petition for certiorari to review the court's judgment. Sup. Ct. R. 19.6; *United Automobile Workers* v. *Scofield*, 382 U.S. 205, 214 (1965).

In any event, the disagreement between the Board and the court below turns on an evaluation of the specific bargaining negotiations in this particular case. Such a fact-bound issue is not one that this Court ordinarily would review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

APRIL 1984

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[5]The Union also contends (Pet. 35-37) that the effect of the court's decision will be to preclude parties from engaging in candid "off-the-record" discussions during negotiations because such discussions will be held to represent the bottom line of the parties for purposes of determining whether they have reached impasse. This contention misconceives the decisions below. The Board in this case did not hold as a matter of law that off-the-record negotiations can never be considered in determining whether parties have reached impasse, nor did the court of appeals hold that they are always determinative. The Board merely held that impasse was not reached under all the relevant circumstances, and the court disagreed. The court's decision thus was confined to the facts of this case.